SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 5

LOUIS COMPAGNA AND CHARLES GIOE,
PETITIONERS,

vs.

WILLIAM H. HIATT, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol.1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

No. 2329

Habeas Corpus

LOUIS COMPAGNA, Petitioner,

vs.

W. H. HIATT, WARDEN, United States Penitentiary, Atlanta, Georgia, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS—Filed September 2, 1948

To the Honorable E. Marvin Underwood, Judge of the District Court of the United States for the Northern District of Georgia:

1. Your petitioner, Louis Compagna, respectfully represents that he is being restrained illegally by virtue of a certain judgment entered by the United States District Court, Southern District of New York, and is illegally restrained of his liberty by being confined in the United States Penitentiary, Atlanta, in said District.

2. The person restraining the liberty of petitioner is W. H. Hiatt, Warden of said Penitentiary, who resides at said Penitentiary, in said District.

3. The cause or pretense of said restraint is by virtue of a mittimus in due form based upon the New York judgment herein described, coupled with a parole warrant also described herein.

[fol. 2] 4. The attorneys for your petitioner are M. Neil Andrews, 404-22 Marietta Street Building, Atlanta, Georgia, and William Scott Stewart, 77 West Washington Street, Chicago, Illinois.

5. Your petitioner has been arrested and committed by virtue of an order signed by a member of the Parole Board

and designated as a warrant. The form of warrant is shown by the copy hereto attached. The warrant recites that your petitioner was sentenced by the United States District Court to serve ten years for the crime of violation of Anti-Racketeering Act, Title 18, Section 420A, U. S. Code and was on the thirteenth day of August, 1947, released on parole from the United States Penitentiary, Leavenworth, Kansas.

6. The warrant recites further that whereas, reliable information has been presented to the undersigned member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice. And commands that any federal officer authorized to serve criminal process execute same by taking your petitioner to the penitentiary.

7. Your petitioner states that he is person suffering legal wrong because of the agency action herein described within the meaning of the relevant statutes and this petition is filed in order to secure judicial review, and the relief prayed, by virtue of the provisions of the Administrative Procedure Act.

8. Your petitioner submits herewith and makes a part hereof a certain Congressional Report and a record of certain Congressional hearings which form some of the foundation and proof of the allegations made in this petition.

[fol. 3] 9. The United States Board of Parole has been created and exists by virtue of a certain statutes as an Agency of the United States government and is a branch of the Department of Justice under the general supervision of the Attorney General.

10. Your petitioner alleges that the parole was issued in good faith in the regular course of the business of the United States Board of Parole, acting pursuant to the authority to it granted by the Statutes, and in accordance to its usual practice. There is no basis in the facts or the law for revocation. Members of the Parole Board have testified that since the commencement of the investigation, they have examined the file carefully and have reviewed the case and have found no ground upon which this parole might be legally revoked.

11. Your petitioner submits herewith and makes a part hereof the printed report of the Congressional Committee, being House Report No. 2441, 80th Congress, 2d Session, from which your petitioner quotes (p. 1):

> "To date, while the hearings have disclosed the use of considerable money and the employment of individuals in a position to exert influence with those in authority, the committee has been unable to discover any violation of Federal law."

12. The only money disclosed by the testimony produced in the Congressional hearing was that paid in settlement of income tax claims made by the government, the payment of fines and the payment of attorneys' fees. The services rendered by the attorneys are shown to have been necessary, proper and lawful. It has been said in these proceedings that some of the attorneys' fees were excessive, but your petitioner was never given an opportunity to [fol. 4] prove the circumstances surrounding upon which an opinion as to their value might be based. Your petitioner paid his fine, no one pleaded poverty. Your petitioner paid his income taxes and settled tax claims, long before application for parole.

13. Your petitioner states the fact to be that he has done nothing wrong and has violated no law, rule or regulation in securing parole, and as far as petitioner has been able to learn, no one connected with the granting of parole has violated any law, rule or regulation. Your petitioner states that no evidence has been produced before the Congressmen, or found anywhere to show that any law, rule or custom was violated, or that there was anything improper in the granting of parole in this case.

14. To quote further from the report (p. 2):

> "The hearings do indicate that the granting of the paroles was improvident, in part due to negligence, and should long have been revoked. At the last hearing held in Washington on June 7, 1948, the members of the United States Parole board, one recently appointed, assured the committee that definite action on the committee's request that the paroles be revoked would be taken, not later than the 19th day of June 1948."

15. There are no facts disclosed at the hearings to indicate that the granting of the parole was due to negligence. Whether the parole was improvidently granted is a mere expression of opinion by the Congressmen. From the views of one of the members of the Committee, printed as a part of the Congressional Report (p. 18), it will be observed that this matter has been agitated by a newspaper which sought to use the Committee to serve its own private political hatreds and ambitions, through baseless [fol. 5] attacks on various public officials (p. 23). Subsequent developments indicated that much of this publicity was gossip or rumor, containing little or no foundation in fact (p. 18). That many misstatements of facts and editorials were printed, suggesting that improper political influence was exercised in the granting of the parole. This continued attack is purely political, to smear the party in power, says the Congressional report (p. 21). The opinion expressed by certain Republican Congressmen was intended to reflect upon the Administration of the law in the hands of the Democratic party.

16. The report of the Congressmen assumes the presence of influence, without evidence, and in the face of emphatic denial by the Parole Board members. The Minority Report to Congress finds (p. 23):

> "In summary, the evidence before the committee has failed to produce the slightest indication that the Board of Parole was influenced by any improper motive in granting the paroles under consideration. The Department of Justice and the FBI have worked diligently on the case, and one of the parolees has already been arrested with likelihood that his parole will be revoked."

17. The transcript of the Congressional hearings, also submitted herewith and made a part hereof, will demonstrate a deliberate smear campaign carried on by certain Congressmen, calculated to discredit the President of the United States, the Attorney General, members of the Parole Board, and other Public Officials for political purposes.

18. By reason of the power of the Congressonal Committee considerable pressure has been brought to bear upon [fol. 6] the members of the Parole Board to end this parole. A study of the transcript will show a change of attitude in the end on the part of the Parole Board members from that

taken at the commencement of the Congressional hearings. No new facts were presented by the Congressmen, the law and the statute remained constant. The Committee finds in its report to Congress that the paroles should be revoked. Over a period of months, from January to September, 1948, some of the Congressmen have been demanding revocation.

19. In its report the Committee calls attention to a refusal on part of the Parole Board to act and asks (p. 17):

> "Can it be that the same influences which caused the paroles to be granted in the first instance are still operating?"

20. So it appears that the Congressional Committee compelled the Parole Board to either revoke, or be accused of corruption. Your petitioner has been caught in the middle of a political quarrel, or a contest between powerful forces.

21. Charges of misconduct were made by some of the Congressmen against the Parole Board, without any basis in the evidence, and in contradiction of the sworn testimony produced before them. The Congressional report states that (p. 15):

> "Either because of a lack of inclination or insufficient time the hearings held by the members of the Parole Board, after application for paroles had been made to it, were neither thorough nor complete, merely perfunctory."

22. This statement in the Congressional report is opposed to the uncontradicted testimony of the Board members. [fol. 7] Many material matters heard and considered by the Board are omitted from the --port. The former head of the Parole Board has died since the parole was granted and another has resigned. Replacements were made during the Congressional hearing. The warrant here in question is the result of the smear campaign and was issued arbitrarily and capriciously, without any justification in law or fact. The warrant was issued merely to satisfy, if possible, the demands of certain Congressmen, made under threat of such action with their power, in the event that the parole was not terminated. Some of these demands and threats are shown in the record of the Congressional hearings (p. 459). When Daniel M. Lyons testified that he had reviewed

the case and had examined the file carefully and saw no legal basis for revocation, one of the Congressmen expressed his personal view that Mr. Lyons should be impeached (p. 85). Mr. Lyons testified on September 25, 1947 (p. 51):

> "The man has been liberated by proper process, and I have no right to deprive him of his liberty without an equally proper process, and no such process is available to me now."

23. The report states that (p. 31):

> "This Committee has the right to believe that, on the basis of evidence adduced by us, the paroles should be revoked and the four men returned to prison."

24. The transcript demonstrates that the hearings were used by some of the Congressmen to make unfounded accusations and insinuations. Witnesses, including officials, were abused and interrupted. The testimony was twisted and its effect misrepresented. Witnesses were made to appear to say one thing, when in fact another impression [fol. 8] was intended. The hearings were ex parte. No one but the Congressmen were permitted to question witnesses. As appears from the transcript (p. 992) Daniel Lyons requested the privilege of examining witnesses which was denied. Mr. Lyons, who was Chairman of the Parole Board, wrote the Congressmen (p. 995):

> "I am unwilling to select the Subcommittee as my agent for the presentation of evidence or the obtaining of information."

Mr. Lyons has since resigned from the Parole Board.

25. A comparison of the printed Congressional report and the transcript will demonstrate the unfairness of the report in many particulars. Certain information is set out in the report followed by this statement (p. 17):

> "All of this information was either known, or should have been known to the Board before the paroles were granted, had the Board exercised reasonable diligence."

No material fact was developed by the Congressional hearing which was not known and considered by the Parole

Board. The explanations given by the members of the Parole Board and further facts necessary to understand the entire picture have been omitted from the report. The transcript shows that each circumstance, deemed to reflect upon the Board, was put to the members of the Board and fully explained by the members. The suspicions of the Congressmen were shown to be unfounded. Facts, recited by the Congressmen, were shown to be not controlling or were of no consequence in connection with other facts. The Congressmen repeatedly questioned the wisdom of the action of the Parole Board, but it was explained to them that matters of judgment were by law left to the Board. [fol. 9] Nothing was shown to bring about any legal method by which that judgment could be overruled or reversed. (See testimony of Daniel Lyons, p. 29, and other members.)

26. The unfairness of the manner in which the Congressional Committee hearings were conducted is such that the record there made cannot be regarded as reliable information. Judge Rogers, who signed the warrant was put upon notice, by reason of his attendance and his examination of the transcript, that the results so obtained should be weighed with caution and viewed with suspicion. Due process is denied, as soon as it is made to appear that reliable — has been placed upon the Congressional transcript and record. The warrant is based solely upon the unreliable information contained in the Congressional transcript.

27. As is shown by the transcript of the Congressional hearings the investigation developed no facts upon which a revocation could be predicated.

28. Members of the Board, including Judge Rogers, testified that no fact had come to their attention after careful study and investigation to cause them to believe that any ground existed to warrant revocation in the matter of securing parole. Judge Rogers stated that he believed that the parolee had a vested interest in his liberty on parole (p. 1170) and that unless some subsequent violation took place the parole could not be legally revoked.

29. Mr. Daniel Lyons testified (p. 45) that the parolees were entitled to their liberty as a matter of law.

30. Since the arrest of your petitioner, George G. Killinger, Chairman of the Board, has written your petitioner's

attorney in response to an inquiry, that we have the assur-
[fol. 10] ance of the Board that there will be no effort made to revoke the parole on any ground existing at the time the parole was granted.

31. It is evident, from the transcript, that the unfavorable action was promised and agreed upon, before the Board, or any member, could find any justification for revocation in law or fact. It appears from the transcript that the Parole Board regarded the transcript of the Congressional Committee as a complaint and the recital in the warrant that it has been issued upon reliable information refers to the transcript. In other words, Judge Rogers was forced to regard the Congressional transcript as a complaint, containing information which he has certified as reliable.

32. Your petitioner states that the information to be found in the Congressional transcript does not comply with the statutory requirement as basis for a warrant. There is not one line of testimony to indicate a violation subsequent to parole. In fact all of the parole authorities who testified indicated that your petitioner had kept the conditions of parole and had in every way complied with the laws and the rules. The Congressmen stated that your petitioner had been careful to abide by the parole agreement. Judge Rogers stated that your petitioner was a good parole risk, and indicated in his testimony given on June 7, 1948, that your petitioner had proved to be a good risk and your petitioner had not violated. Nothing has happened since June 7, 1948, when Judge Rogers made that statement, that your petitioner has not violated, to properly form a basis for the warrant.

33. Before the warrants were issued, your petitioners requested a hearing of the question as to whether any such
[fol. 11] action should be taken. This right was denied by the Board.

34. Your petitioner has requested a hearing which will include the right to counsel, the right to produce witnesses and other rights deemed requisite. This has been refused. The Board has replied in effect—that a secret hearing will be held within the walls of the penitentiary from which hearing every one but the prisoner will be

excluded. This is in accordance with the rules and present custom and practice of the Board.

35. Your petitioner has carefully studied all of the papers given to him by the parole authorities concerning the matter of the conduct expected. Also, your petitioner has from time to time inquired of the parole authorities as to the rules he must follow and he has received advice from time to time concerning specific problems, before taking any action, in an effort to strictly comply with every rule. Your petitioner states that he has faithfully complied with all conditions of his parole and all rules known to him and has not violated his parole in its spirit or in its letter.

36. Upon the hearing, your petitioner requests and seeks a full investigation of the causes for the issuance of said warrant and represents that a hearing will disclose that there has been no violation and that the warrant was issued arbitrarily without just cause.

37. There is filed and submitted herewith and made a part hereof a certified copy of the record of the trial in New York. It was claimed upon the trial that the conviction was founded upon perjury, but now in the light of subsequent events your petitioner is in a position to prove [fol. 12] and state the fact to be that the perjury was known to be such by the prosecuting officials at the time of its use in the trial. The perjury was about material matters and without the perjury, known to be such, the government had no cause against your petitioner. A certified copy of the judgments against Bioff and Browne are submitted herewith and made a part hereof. It will be observed that after the original conviction and after the trial, on December 22, 1944, the sentences against Bioff and Browne were reduced to relieve them immediately of imprisonment. Bioff and Browne protested when they were put in jail after testifying, and said that if they were not released they would tell of the deal they had made with the prosecutors. They threatened to tell how they were promised their fredom in exchange for their testimony. They threatened to tell of the manner in which the case against your petitioner had been arranged and fabricated with the assistance of the prosecutors. Upon the trial they said that there had been no promises, which was false and known to be false

by them and by the prosecutors. Their testimony connecting your petitioner with crimes committed by them was false and known to be false by them and by the prosecutors.

38. In the matter of the Estate of Frank Nitto in the Tax Court as appears from the transcript submitted herewith, the government took the testimony of witnesses including those who testified as victims at the New York trial.

39. Among the witnesses who testified both in the tax case and as to petitioner are the following: Austin C. Keough, Samuel Carlisle, Albert Warner, George Mergenroth, John A. Flaherty, and Hugh J. Strong.

40. That version given at the request of the Government officials in the New York trial was false, was known [fol. 13] to be false by the witnesses and the Government officials. This perjured testimony was material and without it no case could have been made out against your petitioner.

41. The charge in the indictment that the conspiracy was formed in New York was false when it was made at the trial and when made before the grand jury and was known to be false when used by the prosecutors. The New York court did not have jurisdiction and its judgment is void.

42. Your petitioner was sentenced to serve ten years in the penitentiary and to pay a fine. The fine has been paid. The judgment was affirmed by the Circuit Court of Appeals, United States v. Compagna, 146 F. 2d 524 and certiorari denied by the Supreme Court, 314 U. S. 687 rehearing denied 314 U. S. 714, 316 U. S. 710. Your petitioner was denied bail upon appeal and elected to commence sentence. After your petitioner served one-third of the sentence, parole was granted.

43. Although the point was properly preserved and the question was duly submitted on appeal, the Circuit Court refused to pass upon the matter of venue. The point was disposed of as if it were a complaint as to the technical sufficiency of the indictment.

44. The facts and circumstances by which your petitioner is able to prove the knowing use of perjury at his trial was not known to petitioner until after the appeal was terminated.

45. As is shown by the record submitted herewith the indictment consists of one count and charges that your petitioner conspired with other defendants, Bioff, Browne, Circella and persons unknown, to violate the statute [fol. 14] known as the Anti-Racketeering Act, Section 420, 18 U. S. C. A.

46. The conspiracy is alleged to have been a continuing one from 1934 (the date of the passage of the Act), to the return of the indictment in 1943. The indictment charges, in the language of the Act, that in connection with and relation to acts affecting foreign and interstate trade and commerce, the defendants conspired to obtain, by the use of and threat to use, force, violence and coercion, the payment of over a million dollars, from a group of corporations, referred to as the victim, including, Loews, Paramount, Twentieth Century Fox and Warner Brothers. It is alleged that Browne, Bioff, Circella and Kaufman were connected with a labor union, i. e., the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, called the IATSE. That the victims were engaged in interstate commerce in the production, distribution and exhibition of motion pictures, that the defendants would dominate, control and direct the IATSE, that the million dollars would be obtained by wrongful use of force and fear by demanding that the victims pay for protection viz, to prevent and dissuade the defendants from restraining, impeding and obstructing, interstate distribution and exhibition of motion pictures throughout the United States and otherwise injuring and destroying the business of the victims.

47. The evidence may be summarized as follows: George Browne, (R. 1014), was International President of a labor union affiliated with the American Federation of Labor. In the various local unions, members worked at the operation of moving picture machines and, in Hollywood, various [fol. 15] craftsmen, members of the union, were engaged in the production of moving picture films. Before Browne was elected in 1934, the former International President had lost a strike in Hollywood. The loss of this strike is explained by the fact that other unions failed to cooperate. Instead of forcing their demands upon the employers, the strike failed and resulted in a loss of membership to the IATSE.

The then president lost prestige and Browne was elected without opposition.

48. It appears that during all of the time in question, the employers and employees in Hollywood have been working under what is known as a basic agreement. The representatives of Employers and Labor met annually and formed an agreement. Wages and working conditions were settled for the period. When the IATSE lost their prestige and power, they were not included in the basic agreement with the other unions. After Browne was first elected in 1934, he appointed Bioff as his personal representative and Bioff and Browne proceeded to restore the power of the IATSE in Hollywood by the following method.

49. The producers in Hollywood are so closely connected with the exhibitors that neither the producers nor the exhibitors could withstand a strike in the Chicago theaters. Bioff and Browne took advantage of this tie up, by exerting pressure upon the exhibition end of the entire structure. They called a strike against the exhibiting chain in Chicago in 1935. This strike lasted only a few hours and was sufficient to cause the executives of the producers to run to Bioff and Browne to find out what they must do in order to stop the strike and avert further labor trouble. Bioff and Browne demanded that [fol. 16] the IATSE be restored to power in Hollywood and forced this, and many other advantages, for the International Union. Your petitioner had nothing to do with all of this.

50. Subsequently, Bioff and Browne took advantage of the power of the position they found themselves in after their jurisdiction was restored, and collected large sums of money from those engaged in the production, distribution, and exhibition of moving pictures.

51. Browne and Bioff were prosecuted and convicted of the substantive offense, prohibited by the Anti-Racketeering Act and sentenced to eight years in the penitentiary and to pay a fine of twenty thousands dollars. The fine was paid to avoid a more severe sentence. After their conviction, they appeared in the trial as witnesses for the prosecution. They furnished evidence of circumstances from which the government succeeded in convincing

the trial judge and the jury that your petitioner was guilty of the conspiracy charged. It cannot be disputed that Bioff and Browne obtained large sums of money from companies alleged to have been the victims. Your petitioner states that your petitioner had nothing to do with the obtaining of this money nor did your petitioner receive any of it.

52. Your petitioner is not guilty of the charge made and by reason of some of the facts developed by the legislative committee, including facts which your petitioner was unable to prove prior to the hearings, your petitioner states that the conviction rests upon perjured testimony. The facts and circumstances proved, including some disclosed by the Congressional hearings, are such that the prosecuting authorities have been put upon [fol. 17] notice and must know that perjury is the basis of the conviction of your petitioner.

53. Bioff was not corrob-ated in the essential portions of his testimony by which it was sought to connect your petitioner with his misconduct. Bioff testified that he desired to serve his sentence to full unless he could be released on bond to fight in the army. No such release was possible because of a previous conviction for pandering.

54. The Congressional hearings developed the fact that the trial judge expressed himself as of the opinion that Bioff and Browne were the bell-wethers and consequently that your petitioner should not be required to serve longer sentences than demanded of Bioff. Upon this hearing many circumstances will be shown to prove that Bioff engineered a plot to convict your petitioner in order to free himself. At his trial Bioff claimed that the money he obtained was delivered to Schenck, one of the movie producers. Bioff had been in the home of Schenck, so he merely used his knowledge of the details acquired upon a social visit and transposed these details to a visit he perjured himself about. Bioff admitted this perjury at the trial of your petitioner and then told another set of falsehoods in which he claimed delivery of the same money to the defendants including your petitioner.

55. The prosecution presented circumstantial or indirect evidence and nothing else. The record submitted herewith will show that although Bioff and Browne by inference,

claimed that they conspired with your petitioner, they do not claim to have been present when any agreement was made or plan outlined such as that alleged in the indict-
[fol. 18] ment. The existence of the agreement alleged must be inferred, if one existed. The prosecutor did not claim to have direct evidence of any such agreement. Bioff and Browne did not say that they conspired to commit acts affecting interstate commerce. No such agreement or conspiracy as that alleged in the indictment was proved by direct evidence. We claim here that it was never proved at all.

56. Your petitioner had no interest in the union and was not concerned with its object. No one claimed to have any proof to the contrary of this statement. Your petitioner did not belong to the union or any union nor did your petitioner hold any union position. The prosecutors secured conviction of your petitioner by assuming from scattered conversations over a period of years, mainly with persons dead, that the conspiracy existed. Then it became merely a matter of identifying the conspirators.

57. Your petitioner at the time of the trial and of the acts claimed, was a resident of Illinois. The testimony given at the trial by Bioff shows that he told the same story he testified to in the trial to the Grand Jury and to the prosecuting authorities. The indictment charges that the conspiracy was formed in New York. This allegation was false and known to be false by the prosecuting authorities. The New York court did not have jurisdiction.

58. The prosecuting authorities chose New York because of conditions which made that jurisdiction unfavorable to your petitioner, and very inconvenient. Numerous persons were required to travel from Chicago, give bond to stay in New York and then were not called as witnesses. This and
[fol. 19] other tactics were employed to convince the public in New York that your petitioner was part of an organized gang of criminals. In fact the record shows that your petitioner was prosecuted and convicted upon general principles. The proceedings were but a mask, your petitioners were afforded a trial in name only, the jury by reason of the deliberate conduct of the prosecutors were converted into a mob. They were so blinded by prejudice that any dispassionate consideration of the evidence was impossible.

59. The Anti-Racketing Act excepts from its provisions the action of union officials in carrying out the legitimate objects of labor. Bioff and Browne obtained the money by reason of their union position upon threat of strikes. Your petitioner had no part in the strikes or the demands for money and no one claimed that your petitioner took any such part. So on this ground the New York court had no jurisdiction under the undisputed facts.

60. The conduct of Bioff and Browne as union officials concerned strikes and threatened strikes in local theaters. It had nothing to do with interstate commerce and did not come within the provisions of the Anti-Racketeering Act. Congress has no power to legislate on local matters and the federal court in New York was without jurisdiction for this reason, as was shown by the undisputed evidence at the trial and which your petitioner will demonstrate here.

61. John Rosselli was convicted in the same trial and paroled at the same time. Rosselli resided before and after his parole in Los Angeles, California. He was arrested on a similar warrant issued at the same time as that against [fol. 20] your petitioner. He petitioned for habeas corpus in California and the matter is there pending under advisement.

62. When DeLucia, a co-defendant, was arrested, he was taken to the Cook County Jail in Chicago, Illinois, to await transportation to the penitentiary in Leavenworth, Kansas, which had been arranged for the afternoon of the arrest. The petition for habeas corpus was filed and the writ issued within a few hours of his arrest. Some of the Congressmen and some of the newspapers issued statements from day to day to the effect that the Marshal had bungled the matter of arrest, and if it had been handled properly, De Lucia would have been taken from the jurisdiction of his home before any petition could be filed. It was charged that your petitioner's attorney had benefited by a so-called leak and had taken advantage of advance information concerning the arrest. The writ was called a convenient and easy writ of habeas corpus and insinuations were made that there was something illegal or underhanded about the application for relief from the District Court in Chicago. The Congressional Committee called a meeting in Chicago and required the law printer and your petitioner's attorney to explain

how it happened that the petition had been prepared in advance. It was explained that the transcript of the hearings of the Congressional Committee contained sufficient notice to suggest that it would be advisable to be prepared. The news of this examination of witnesses before the Congressional Committee was reported in some of the papers as if there were something improper about the application for habeas corpus.

63. So a conspiracy was then formed by various officials, [fol. 21] including representatives of the Parole Board, deputy marshals, F.B.I. agents and others to kidnap your petitioner from his home at 5 or 6 o'clock in the morning, and to put him upon a train scheduled to leave for the prison in Atlanta at 7:30 A.M., in order that your petitioner should not have an opportunity to seek relief in the courts of his home District. This conspiracy was formed and carried out by government agents in violation of rights guaranteed by the Constitution and the statutes, particularly Title 8, Chapter 3, Civil Rights U. S. C.

64. Gioe was arrested in his home about 5:30 A.M., taken on the train at 7:30 A.M., August 19, 1948, and prevented by the agents from making any application to the courts of the Northern District of Illinois, and was prevented from communicating with any one.

65. Compagna did not happen to be at home when the government agents arrived at his home. He surrendered in the District Court in Chicago the same morning when he learned that a warrant had been issued for him. His application was denied the same morning it was presented. The government attorneys stated in opposing the writ on August 19, 1948 and in opposing a stay for the purpose of appeal, that the Board was about to meet in Atlanta and any delay might cause Compagna to miss the hearing. At the time of preparing this motion no hearing has been granted. Compagna was taken to Atlanta on the day of his arrest.

66. The warrant for your petitioner was received by the United States Marshal in Chicago at 10:30 A.M., August 18, 1948. As was well known by the officials, a telephone call would have caused your petitioner to appear in the [fol. 22] office of the marshal within the time it would take your petitioner to travel from his home. The officials knew

where your petitioner was every day, twenty-four hours a day. Each and every time your petitioner was wanted by any official, a telephone call had resulted in an immediate appearance.

67. A Congressional Committee is investigating Russian spy activities and a woman has given evidence incriminating certain public officials. Some of the Congressmen are reported in the press to have made statements linking your petitioner with that exposure on the ground that misconduct in public office is concealed from the public by means of secret hearings, and Congress has been denied access to reports by the President. This is all political wind bag stuff, but it is dangerous and harmful. It is calculated to inject the case of your petitioner into the coming political campaign for President. This sort of a situation makes it all the more important that the courts enforce those rights given your petitioner to insure fair treatment.

68. As is shown by the Congressional transcript, the present members of the Parole Board have been acting as investigators and are disqualified as hearing officers under the provisions of the Administrative Procedure Act. Also, it appears that they have been forced by the Congressional Committee to prejudge this case and to express opinions contrary to the rights of your petitioner.

69. Your petitioner states that under the rules of the Parole Board and its established practice, no provision is made for a hearing of any kind in the matter or issuance of a warrant. These warrants were issued without any hearing, arbitrary without cause or basis and are void. [fol. 23] The Agency has provided no method by which the action of a Board Member might be reviewed within the Board or is there any method suggested in the rules or practice of the Board providing for judicial review relative to warrants. The warrant is in fact and effect a commitment. There is a final agency action for which there is no other adequate remedy in any court made reviewable by the Administrative Procedure Act, Section 10.

It is alleged that, and the Court is requested to find that, the action of the Parole Board was:

(1) arbitrary, capricious, and abuse of discretion and otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, and immunity;

(3) in excess of statutory jurisdiction, authority, and limitations, and short of statutory right;

(4) without observance of procedure required by law;

(5) unsupported by substantial evidence;

(6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The agency action has been unreasonably delayed.

All of which is made reviewable by Section 10(e) of the Administrative Procedure Act.

70. There is no method or procedure provided by the rules or the practice of the Parole Board, known to your petitioner by which a parolee may be granted his liberty under parole supervision or on bail pending determi- [fol. 24] nation after a warrant is issued and served. The agency has failed to preserve the status quo.

Your petitioner demands relief as follows:

1. That the Court declare the New York judgment void and that the Parole Board has no power to take any action thereon for lack of jurisdiction.

2. That the Court declare the warrant void as having been issued contrary to law.

3. In the alternative, that the Court grant such interim relief as may be deemed just and proper pending further action by the United States Parole Board. This relief may take the form of a bond to be approved by this court conditioned upon appearance before any hearing conducted by the Board and submission to any and all orders of the Board, or the Board may be ordered to withhold action on the warrant and to permit your petitioner to remain on parole until further order of the Board.

4. That the Parole Board be ordered to return your petitioner to the District of his home in Chicago, Illinois.

5. That the Parole Board be ordered to grant your petitioner a hearing in compliance with the requirements

of the Administrative Procedure Act. This hearing to be public and to include the following:

a. That the Parole Board be ordered to conduct the hearing in the District of the home of your petitioner in Chicago, Illinois.

b. The benefit of counsel at all stages of the proceeding, including those preliminary to the hearing.

[fol. 25] *c.* A specification of the charges or outlined of the evidence upon which the warrant was issued and said to be reliable by the member signing the warrant. This to be furnished in advance of the hearing in order to give the parolee an opportunity to prepare.

d. If there is to be any attempt to revoke the parole on the ground that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole, petitioner requests a statement to that effect with a specification of the reasons.

e. Designation in advance of the time and place of the intended hearing in order that petitioners may present their witnesses.

f. The privilege of confronting any witnesses who claims to know of any violation and to hear their testimony and to cross-examine.

g. The opportunity and permission to produce witnesses.

h. Permission to have counsel present at all stages of the hearing and to have the benefit of representation by counsel.

i. Permission to have present at all stages of the hearing a court reporter to be selected and paid by petitioner, or that the Board require the presence of a court reporter and furnish petitioner, at their expense, with a transcript.

j. Notification of the action of the Board together with a copy of any findings made or orders entered.

k. A copy of the rules of the Board or such regulations as may be said to govern or bear upon the matter of the hearing.

[fol. 26] Your Petitioner states that various petitions have been filed in this matter as follows:

John Rosselli, a co-defendant on parole has applied for a writ of habeas corpus in Los Angeles, California and the matter is now under advisement. A stay order was entered and Rosselli is in custody of the Marshal pending disposition of the case.

Paul De Lucia, a co-defendant on parole, is on bail pending disposition of a writ of habeas corpus in Chicago.

Louis Compagna applied for a writ of habeas corpus in Chicago and same was denied. An appeal is pending.

Paul De Lucia, Louis Compagna, and Charles Gioe applied for relief by way of a petition for judicial review in Chicago. The United States Attorney filed a special appearance and questioned the jurisdiction of the Court over the Parole Board. These petitions were dismissed and an appeal is pending.

The Parole Board has set September 8, 1948 as a tentative date for a hearing in prison and on this September 2, 1948 for the first time has notified your petitioner of the nature of the charges to be made as a basis for revocation as follows:

1. Failure to reveal source of monies used in settlement of internal revenue tax, when questioned before a legally constituted body.

Your petitioner states as a fact that the Board has no evidence to support any such charge for the simple reason that no such evidence exists as is well known by the members of the Board. Your petitioner was asked by the Congressmen who paid the money used in settlement of [fol. 27] income tax and your petitioner truthfully answered that your petitioner did not know. This money was paid while your petitioner was a prisoner in the penitentiary.

2. Failure to conduct himself honorably.

Your petitioner states that this charge is vague and indefinite and can be answered only in like terms. Your petitioner states the fact to be that your petitioner has conducted himself honorably at all times while on parole which fact is well known to all of the members of the Parole Board and the members are in possession of no evidence to support this charge for the simple reason that none exists.

3. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

Your petitioner truthfully answered all questions concerning this trip and as is well known to the members of the Parole Board the parolee traveled by air from the prison to Chicago in the company of each other and did everything required of them by the rules and regulations of the authorities.

The Parole Board members have been in possession of all of the information available concerning this trip since the date of the trip or shortly thereafter and the making of a charge based upon said trip is merely evidence of the desperation of the Parole Board caused by the pressure on the Board to find some legal justification for the warrant.

Wherefore, petitioner avers that his further restraint is illegal and prays Your Honor to issue a Writ of Habeas Corpus directed to said W. H. Hiatt, Warden, requiring [fol. 28] him to bring your petitioner before Your Honor at the time and place to be specified in the Writ for the purpose of examination into the legality of the restraint.

Louis Compagna.

Wm. Scott Stewart, Chicago, Illinois; M. Neil Andrews, Atlanta, Georgia, Attorneys for Petitioner.

Duly sworn to by Louis Compagna. Jurat omitted in printing.

[fol. 29] DEPARTMENT OF JUSTICE
Washington, D. C.

(Seal)

WARRANT

The United States Board of Parole

To any Federal Officer Authorized to Serve Criminal Process within the United States:

Whereas, Louis Compagna was sentenced by the United States District Court for the Southern District of New York to serve a sentence of ten years—months and—days for the crime of violation of Anti-Racketeering Act, Title 18,

Section 420A, U. S. Code and was on the thirteenth day of August, 1947, released on parole from the United States Penitentiary, Leavenworth, Kansas.

And Whereas, reliable information has been presented to the undersigned member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice.

Now, therefore, this is to command you to execute this warrant by taking the said Louis Compagna wherever found in the United States, and him safely returned to the institution hereinafter designated.

Witness my hand and the seal of this Board this 15th day of June, 1948.

Fred D. Rogers, Member U. S. Board of Parole.
(Seal.)

[fol. 30] In United States District Court

[Title omitted]

First Amendment to Petition—Filed September 27, 1948

May It Please the Court:

70. Since the filing of the petition herein two members of the Parole Board, George Killinger and Boleslau Monkrewicz, met in the Penitentiary at Atlanta on September 8, 1948, and conducted what is termed by them to be a hearing. Your petitioner was cross-examined concerning the charges herein referred to and your petitioner repeated denial to said charges. A court reporter took notes. Your petitioner maintained and stated to the members of the Board that no violation of parole had occurred. The matter was continued generally and referred to Washington. No evidence other than that of your petitioner was introduced. Although specifically requested of the members of the Board on September 8, 1948, your petitioner was denied the right of counsel and all other necessary incidents of a proper hearing.

71. Your petitioner represents that the Parole Board has refused and failed to comply with the requirements of the Administrative Procedure Act in the conduct of said hear-

ing, which requirements are fully set out in the petition filed herein.

72. The arrest of your petitioner took place upon July 23, 1948. The warrant for your petitioner was received by the Marshal in Chicago at 10:30 A.M., July 22, 1948. These dates were erroneously stated in the petition by inadvertence.

73. Your petitioner has been held prisoner in the United States Penitentiary since July 23, 1948, without just cause. [fol. 31] Your petitioner believes that, unless this court will prevent, it is the intention of the officials of the Government to delay these proceedings and final action upon these paroles, until after the Presidential election in November, for reasons political. Meanwhile, your petitioner will be illegally held as a prisoner, unless relieved by this Honorable Court.

74. Your petitioner again respectfully prays for the writ of habeas corpus in order that a hearing may be had in this Honorable Court and that your Honor enter such orders as justice and the law may require.

Louis Compagna.

This amendment to the petition was duly signed and verified by each petitioner.

[fol. 32] In the District Court of the United States for the Northern District of Georgia, Atlanta Division

No. 2330—Habeas Corpus

Charles Gioe, Petitioner,

vs.

W. H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia, Respondent

Petition for Writ of Habeas Corpus—Filed September 2, 1948

To the Honorable E. Marvin Underwood, Judge of the District Court of the United States for the Northern District of Georgia:

1. Your Petitioner, Charles Gioe, respectfully represents that he is being restrained illegally by virtue of a certain

judgment entered by the United States District Court, Southern District of New York, and is illegally restrained of his liberty by being confined in the United States Penitentiary, Atlanta, in said District.

2. The person restraining the liberty of petitioner is W. H. Hiatt, Warden of said Penitentiary, who resides at said Penitentiary, in said District.

3. The cause or pretense of said restraint is by virtue of a mittimus in due form based upon the New York judgment herein described, coupled with a parole warrant also described herein.

4. The attorneys for your petitioner are M. Neil Andrews, 404-22 Marietta Street Building, Atlanta, Georgia, and [fol. 33] William Scott Stewart, 77 West Washington Street, Chicago, Illinois.

5. Your petitioner has been arrested and committed by virtue of an order signed by a member of the Parole Board and designated as a warrant. The form of warrant is shown by the copy hereto attached. The warrant recites that your petitioner was sentenced by the United States District Court to serve ten years for the crime of violation of Anti-Racketeering Act, Title 18, Section 420A, U. S. Code and was on the thirteenth day of August, 1947, released on parole from the United States Penitentiary, Leavenworth, Kansas.

6. The warrant recites further that whereas, reliable information has been presented to the undersigned member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice. And commands that any federal officer authorized to serve criminal process execute same by taking your petitioner to the penitentiary.

7. Your petitioner states that he is person suffering legal wrong because of the agency action herein described within the meaning of the relevant statutes and this petition is filed in order to secure judicial review, and the relief prayed, by virtue of the provisions of the Administrative Procedure Act.

8. Your petitioner submits herewith and makes a part hereof a certain Congressional Report and a record of certain Congressional hearings which form some of the foundation and proof of the allegations made in this petition.

9. The United States Board of Parole has been created [fol. 34] and exists by virtue of certain statutes as an Agency of the United States government and is a branch of the Department of Justice under the general supervision of the Attorney General.

10. Your petitioner alleges that the parole was issued in good faith in the regular course of the business of the United States Board of Parole, acting pursuant to the authority to it granted by the Statutes, and in accordance to its usual practice. There is no basis in the facts or the law for revocation. Members of the Parole Board have testified that since the commencement of the investigation, they have examined the file carefully and have reviewed the case and have found no ground upon which this parole might be legally revoked.

11. Your petitioner submits herewith and makes a part hereof the printed report of the Congressional Committee, being House Report No. 2441, 80th Congress, 2d Session, from which your petitioner quotes (p. 1):

> "To date, while the hearings have disclosed the use of considerable money and the employment of individuals in a position to exert influence with those in authority, the committee has been unable to discover any violation of Federal law."

12. The only money disclosed by the testimony produced in the Congressional hearing was that paid in settlement of income tax claims made by the government, the payment of fines and the payment of attorneys' fees. The services rendered by the attorneys are shown to have been necessary, proper and lawful. It has been said in these proceedings that some of the attorneys' fees were excessive, but your petitioner was never given an opportunity to prove the circumstances surrounding upon which an opinion as to [fol. 35] their value might be based. Your petitioner paid his fine, no one pleaded poverty. No claim was made against your petitioner for income tax based upon the money said to have been obtained from the movie industry. Your

petitioner has no knowledge of the income tax cases involving other defendants in the New York case.

13. Your petitioner states the fact to be that he has done nothing wrong and has violated no law, rule or regulation in securing parole, and as far as petitioner has been able to learn, no one connected with the granting of parole has violated any law, rule or regulation. Your petitioner states that no evidence has been produced before the Congressmen, or found anywhere to show that any law, rule or custom was violated, or that there was anything improper in the granting of parole in this case.

The Parole Board has set September 8, 1948 as a tentative date for a hearing in prison and on this September 2, 1948 for the first time has notified your petitioner of the nature of the charges to be made as a basis for revocation as follows:

1. Change of employment without permission.

Your petitioner states that there is no truth to this charge as is well known to the Parole Board members and the Board is in possession of no evidence to substantiate this charge for the simple reason that no such evidence exists. Your petitioner did not change his employment and complied with all rules and regulations by reporting truthfully as to every detail of his employment.

2. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

[fol. 36] Your petitioner makes the same allegations made by Louis Compagna in his petition herewith.

3. Association with persons of bad reputation.

Your petitioner states that there is no truth to this charge as is well known to the members of the Parole Board.

4. Failure to conduct himself honorably.

Your petitioner makes the same allegations made by Louis Compagna in his petition herewith.

5. Failure to give a proper accounting of income and expenditures.

There is no truth to this charge as is well known to the members of the Parole Board. Your petitioner made out

his reports in the manner he was instructed and then after they were filed your petitioner rewrote them to comply with a change made in the requirements of his parole officer. There was nothing improper in this regard as is well known by the members of the Parole Board and the members are in possession of no evidence to substantiate this charge for the simple reason that none exists.

Your petitioner has read the petition of Louis Compagna filed herewith and hereby incorporates the same and adopts said petition in order to make such claims as are applicable to the case of your petitioner.

Your petitioner states that the warrant under which your petitioner is confined is void having been issued arbitrarily without cause and that the New York judgment is void for lack of jurisdiction and because same is based upon perjury known to be such at the time of its [fol. 37] use as more fully described in the petition made by Louis Compagna herewith.

Wherefore, petitioner avers that his further restraint is illegal and prays Your Honor to issue a Writ of Habeas Corpus directed to said W. H. Hiatt, Warden, requiring him to bring your petitioner before Your Honor at the time and place to be specified in the Writ for the purpose of examination into the legality of the restraint.

Charles Gioe.

Wm. Scott Stewart, Chicago, Illinois. M. Neil Andrews, Atlanta, Georgia, Attorneys for Petitioner.

Duly sworn to by Charles Gioe jurat omitted in printing.

Note: Warrant and Order to Show Cause omitted—See Case No. 2329 Habeas Corpus.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed September 2, 1948

The foregoing petition considered.

It is ordered by the Court that the respondent show cause, if any he has, before this Court at Atlanta, Georgia, on the 20th day of Sept. 1948 at 10:00 A.M., why the said petition for writ of habeas corpus should not be granted.

At Atlanta, Georgia, this the 2nd day of September 1948.

E. Marvin Underwood, United States District Judge.

Note: Service omitted.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONSE TO ORDER FOR RESPONDENT TO SHOW CAUSE WHY PETITION FOR HABEAS CORPUS SHOULD NOT BE GRANTED—Filed September 20, 1948

Now comes the respondent in the above entitled habeas corpus proceeding by his counsel, the United States Attorney for the Northern District of Georgia, and in Response To Order For Respondent To Show Cause Why Petition For Habeas Corpus Should Not Be Granted, states that he holds petitioner under and by virtue of a judgment and commitment issued from the United States District Court for the Southern District of New York, in Criminal No. 114/101, a photostatic copy of which is hereto attached, marked Exhibit A, and made a part of this response.

Respondent attaches hereto a photostatic copy of the record of court commitment, showing the petitioner's service of imprisonment under the sentence imposed, marked Exhibit B, and made a part of this response.

On August 13, 1947, petitioner was granted a parole from the United States Penitentiary, Leavenworth, Kansas, by the said United States Board of Parole, and on July 21, 1948, the said United States Board of Parole issued a warrant for violation of parole. The referral for consideration of alleged violation lists three separate acts and

failure to perform proper duties under parole regulations. Photostatic copies of the warrant and referral are attached hereto, marked Exhibit C and Exhibit C-1, respectively, and made a part of this response.

Respondent shows to the Court that these records and the trial of the case in the United States District Court for [fol. 40] the Southern District of New York, appealed to the United States Circuit Court of Appeals for the Second Circuit in *United States* v. *Compagna, et al,* 146 F. (2d) 524, 530, certiorari denied by the Supreme Court of the United States on April 2, 1945, 65 S. Ct. 912, together with the action of the United States Board of Parole in issuing the warrant, prove that petitioner is legally in custody of your respondent for the alleged parole violations, as do the statutes enacted empowering the United States Board of Parole to take such action under authority of law.

The petitioner having served at least one-third of his sentence, was paroled in the power and discretion vested in the United States Board of Parole by Congress (Act of Congress of June 25, 1910, c. 387, § 3, 36 Stat. 819; May 13, 1930, c. 255, § 1, 46 Stat. 272; March 2, 1931, c. 371, 46 Stat. 1469; June 29, 1932, c. 310, § 3, 47 Stat. 381; and June 29, 1940, c. 449, §§ 1, 2 and 3, 54 Stat. 692 as codified in Title 18, Sec. 717 et seq.

Respondent also attaches hereto a certified photostatic copy of the transcript of record in the United States District Court for the Southern District of New York in Criminal No. 114,101, which includes the indictment, docket entries, minutes and judgment sentence, marked Exhibit D, and made a part of this response, for the purpose of showing that the United States District Court for the Southern District of New York had jurisdiction of the subject matter and of the person of the accused when he was indicted, arraigned, tried and convicted for violation of Sec. 2 (a) (b) (d) of Act of Congress approved June 18, 1934, c. 569, 48 Stat., 979 USC Title 18, Sec. 420 (a) (b) (d), known as Anti-racketeering Act, Conspiracy to [fol. 41] interfere with trade and commerce by violence, threats and coercion.

In answer to petitioner's numerous paragraphs relating to his conviction in the Southern District of New York upon perjured testimony, which is uncorroborated, but

which conviction is sustained by the decision of Judge Learned Hand, with other judges of the Second Circuit Court of Appeals concurring, in the case of *United States* v. *Compagna, et al,* supra, in which decision, page 526, paragraph 1, it is stated:

> "• • • As is so often the case in criminal appeals, we are asked to reverse the conviction because the testimony on which the verdict was based was incredible; as always, we reply that that question is not for us, but for the jury. If, viewing the situation as a whole, they chose to believe Bioff, their conclusion was final. Coming to the individuals separately, nothing need be said about Compagna; Bioff connected him with the venture in the most direct way; *apparently he was the chief.*" (Italics supplied.)

There is no evidence at any place in the record, from the beginning of the trial, during the pendency of same, the appeal, the petition for certiorari, and the service of part of the sentence by petitioner until after he was released on parole, except the bare assertion made by him that he was committed upon perjured testimony. A habeas corpus court cannot be concerned with matters of evidence. He was convicted by a jury, in whose province it was to weigh the credibility of the evidence. The appellate court on direct appeal expressly and emphatically affirmed and upheld the trial in the lower court. The Supreme Court denied certiorari. The petitioner began his sentence and served a third or more of it. The record [fol. 42] shows he was paroled and proceeded to violate his parole, for which warrant was issued and he was apprehended, rearrested and reincarcerated within the walls of the penitentiary.

A parole permits an inmate of a penal institution to serve an unexpired portion of a sentence imposed by a court having jurisdiction of the subject matter and of the person of the accused without the walls of a penal institution. As an elementary principle of law, upheld by many courts in ruling authorities, parole is a matter of grace and not a vested right of which parolee can claim he has been deprived of a constitutional right in any manner whatsoever for being re-incarcerated for alleged violation of parole.

Later petitioner was given a hearing in the regular routine course of business by the United States Board of Parole, by a majority number of the Board, in the United States Penitentiary in Atlanta, Georgia on September 8, 1948, and the Board will consider whether or not petitioner has actually violated his parole, and in due course an order will be entered, either holding that he has violated his parole or that he has not, in which latter event he will of course be released. However, such a decision has not been reached at the time of this response to this Honorable Court's order to show cause why the writ should not be granted. In other words, the United States Board of Parole has complied with the statutes, regulations and authorities construing same which empower it, in accordance with Sec. 719, Title 18, USCA, in which section the Act of Congress of May 13, 1930, c. 255, § 1, 46 Stat. 272 and of June 29, 1940, c. 449, § 2, 54 Stat. 692, specifically states that after warrant has been issued and prisoner returned.

> [fol. 43] "he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, *or at any time in its discretion*, revoke the order and terminate such parole or modify the terms and conditions thereof." (Italics supplied.)

Petitioner has not even exhausted his administrative remedy, and this habeas corpus proceeding is premature by reason of the fact that the United States Board of Parole has not taken final administrative action in its discretionary power as provided by the Acts of Congress to actually render final decision as to whether the parole should be revoked or modified or granted. In accordance with the statute, this action will be taken in the discretion of the Board itself and in accordance with the most recent re-codification of the Code, Sec. 4207, Title 18 USC, effective September 1, 1948, in which it is stated Sec. 719 of Title 18, USC, part of which is quoted above,

> "was rewritten to *clarify and ratify existing administrative practice and construction.*" (Italics supplied.)

Petitioner is seeking to review the action of the Board under the Administrative Procedure Act as enacted by

Congress June 11, 1946, Title 5, Secs. 1001, 1011 USCA. However, respondent insists that the Administrative Procedure Act does not apply to the United States Board of Parole, since in Sec. 1009 of Title 5, USCA, the Act provides

> "judicial review of agency action except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

The several Acts of Congress creating the United States Board of Parole and vesting it with its power and discretion to grant parole and revoke parole is one of the exceptions in the Administrative Procedure Act, in that it is by law committed to its own discretion in the granting of parole, which has long been held to be a matter of grace and not a constitutional right, and likewise, within its own discretion, as authorized by Congress, to revoke parole for violations committed by the parolee of terms and conditions on which the parole was granted and the regulations made for the supervision of parolees. The Acts of Congress as codified, even unto the most recent Act re-codifying Title 18, particularly Sec. 4207, is clearly indicative that Congress meant that the United States Board of Parole would come under this exception of the Administrative Procedure Act, in that it was by law committed to its own discretion in such matters, since in Sec. 4207 of the Criminal Code, effective September 1, 1948, it is stated in no uncertain terms that the Acts of Congress and the code sections involving the United States Board of Parole and its powers were not changed in any particular except "to clarify and ratify existing administrative practice and construction."

[fol. 44]

The Administrative Procedure Act was created primarily to review such Boards and Commissions as handle interstate commerce and other matters, and was not created to cover the review of the actions of the United States Board of Parole. Nowhere in the Administrative Procedure Act does it refer to reviewing the discretionary acts of the Board. The Parole Board was created and functioning long before the Administrative Procedure Act. Petitioner may contend that the exception is not in point and that the Board is no exception. Nowhere is it contained, nor would it seem to be, that the Administra-

tive Procedure Act would require the District Courts to review the action of the Bureau of Prisons and its direc-
[fol. 45] tor, the Immigration and Naturalization Service and its director, both of which are sub-divisions of the Department of Justice. Likewise, the United States Board of Parole in its creation and its functions described by Acts of Congress, is a sub-division or a part of the Department of Justice, and it is the contention of this respondent that its discretionary action cannot be reviewed and the District Court does not have jurisdiction to review same.

The Administrative Procedure Act is silent on the express classification of names of Government agencies where action shall be taken by judicial review. The question is, whether judicial review is consonant with the legislative purpose. In the case of *Ludecke* v. *Watkins*, decided June 21, 1948, the Supreme Court of the United States, in regard to the interpretation of the Alien Enemy Act precludes review of enemy alien removal orders, and said, at page 3,

> "As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes 'preclude judicial review' • • • Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt."

The terms, purpose and construction of the several Acts of Congress from 1930 to 1940, hereinbefore referred to, by their terms, purpose and construction leave no doubt that it was not the intention of Congress in the passage of the Administrative Procedure Act to include such judicial review of the Parole Board's action in determining whether to grant parole, whether it has been violated after being granted, and its power to revoke parole for violations of the parole agreement and regulations governing the parolee's actions while on parole.

[fol. 46] Respondent further shows that as a matter of law and recent interpretation of legislation by the Courts, Sec. 10 of the Administrative Procedure Act does not provide for judicial review where statutes preclude it, that insofar as the agency action is by law committed to the agency discretion

> "A statute may in terms preclude judicial review or be interpreted as manifesting a congressional inten-

tion to preclude judicial review. Examples of such interpretation are: *Switchman's Union of North America* v. *National Mediation Board*, 320 U. S. 297."

As was said by the Supreme Court in *Switchmen's Union of North America* v. *National Mediation Board*, supra, at page 301.

"Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied. See *United States* v. *Griffin*, 303 U. S. 226, 232, 237."

The Supreme Court also said in the latter decision

"Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous."

Petitioner is seeking only by assertion in his petition that the Administrative Procedure Act includes judicial review of the Parole Board's action, which is inherent in the history of the statutes pertaining to the granting of parole and conditional release, how it shall be administered, and the discretionary powers of the Board in reviewing as well as granting parole. The answer to this contention is found in *Bowers* v. *Dishong*, 103 F. (2d) 464 (CCA 5), at [[fol. 47] page 466, in which Circuit Judge Hutcheson, speaking for the Court, said

"* * * that this series of statutes creates a parole system applicable to conditional releasees as well as other parolees, under which they take their releases and paroles subject to the contingency of being arrested and returned on warrant issued by the Parole Board or a number, and to the determination by the Board of whether the terms of the parole or release have been violated.

"* * * We think that this is not only settled by the terms of the statute, but by uniform course of authority. Many cases might be, the following cases are cited in support of this view: *Platek* v. *Aderhold*, 5 Cir., 73 F. 2d 173; *Zerbst* v. *Kidwell*, 304 U. S. 459, 58 S. Ct. 872, 82 L. Ed. 1399, 116 A. L. R. 808; *Story* v. *Rives*, 68

App. D. C. 325, 97 F. 2d 182; *Morgan* v. *Aderhold*, 5 Cir. 73 F. 2d 171; *Anderson* v. *Corall*, 263 U. S. 193, 44 S. Ct. 43, 68 L. Ed. 247; *United States ex rel. Rowe* v. *Nicholson*, 4 Cir. 78 F. 2d 468; *Christianson* v. *Zerbst*, 10 Cir., 89 F. 2d 40; *Hogan* v. *Zerbst*, 5 Cir., 101 F. 2d 634; *United States ex rel. Anderson* v. *Anderson*, 8 Cir., 76 F. 2d 375; *McAboy* v. *Klecka*, D. C. 22 F. Supp. 960."

Whether or not the information relied on is sufficient for the Parole Board to act in the petitioner's case as to whether or not he violated his parole is premature at the present time, since the Parole Board has not taken final action or entered any final order as required by law and the rules of procedure, which action and order is by the entire Board, but the entire proceedings "is not a matter for determination by the courts in a habeas corpus proceeding", *Fox* v. *Sanford*, 123 F. (2d) 334, 335 (CCA 5), citing *Bowers* v. *Dishong*, supra, *Christianson* v. *Zerbst*, 89 F. (2d) 40 (CCA 10).

[fol. 48] It is the insistence of the respondent that the granting of parole to the petitioner by the Board is not an action that he can complain of by a collateral attack in a habeas corpus proceeding. Neither does he seem to complain of the granting of the parole, but only the issuance of the violator warrant by the Board or one of its members and the incidents subsequent to the issuance of the warrant. The matter of arrest under the warrant, re-incarceration and appearance before the Board is specifically included in the statutes, and such final determination by the Board, and the entering of the order is in the future, as the hearing was on September 8, 1948. Until the final order of the entire Parole Board has been entered, petitioner, as a matter of law clearly defined in the statutes, cannot collaterally attack the action of the Board on any merit that he can claim as to whether or not he actually violated parole.

This, however, is not an admission on the part of respondent that habeas corpus proceedings can be used to collaterally attack the action of the Parole Board in the matter of this petitioner's parole or his violation of same, since the statutes, including those Acts of Congress with reference to the Parole Board and parolees, as well as the Administrative Procedure Act, so far as the authorities expressly and explicitly rule, cannot be reviewed by the

judiciary as these matters are not judicial, neither is any constitutional right of petitioner involved, since parole is a matter of grace and not a vested right.

As a matter of law, it is the insistence of respondent that Sec. 1009 of the Administrative Procedure Act is no more than a declaration of law and procedure existing prior to the passage of the Administrative Procedure Act. Such a state-[fol. 49] ment was made in the Attorney General's comments on the Bill submitted to the Judiciary Committee of both Senate and House and, having been adopted in the reports of the several Committees, must be taken to represent the understanding of the Committees which considered the legislation, (S. Rep. 752, 79th Cong., 1st Sess. (History, 191, 223)). See *American Stevedores* v. *Porello*, 330 U. S. 446, 452. This interpretation of the Act is set forth in a brief filed in the Supreme Court of the United States recently in the case of *Kirkland, et al.*, v. *Atlantic Coast Line Railroad Company, et al.*

Wherefore, having fully answered, respondent prays that the Order For Respondent To Show Cause Why Petition For Habeas Corpus Should Not Be Granted, be set aside, vacated and petition denied.

J. Ellis Mundy, United States Attorney; Harvey H. Tysinger, Assistant United States Attorney.

[fol. 50] RESPONDENT'S EXHIBIT "B"

Record of Court Commitment

United States Penitentiary, Atlanta, Georgia

Inst. Name, Louis Compagna; No. 63773; Alias, Lefty Louis, Little New York, Louis Carmini, Louis Cook; Color, White; Age, 47, 9-23-00; True name, Louis Compagna; Offense, P. V.-Conspiracy to Interfere with Trade & Commerce by Violence, Threats and Coercion; District, S-NY-New York; Cr. 114/101; Sentence, 10 Years; Fine, $10,-000.00, Paid 5-14-45; Sentence changed, July 23, 1948; New term, 2398 Days; Reason therefor, In custody as P. V. Sentenced, * Dec. 31, 1943; When arrested, July 23, 1948; Committed to Fed. Inst., Apr. 4, 1944, Jul. 24, 1948; Where arrested, Chicago, Ill.; Sentence begins, * Mar. 8, 1944-Jul.

23, 1948; Residence, Berwyn, Ill.; Time in jail before trial, Since arrest; Expires full term, Feb. 14, 1955; Former com. on sentence to other institutions, *12-31-43: Appealed, *3-8-44: Elected to serve sentence pending appeal; Person to be notified in case of serious illness or death: Name, Mrs. Charlotte Compagna; Relation to prisoner, Wife; Address, 2927 S. Maple Ave., Berwyn, Ill. Action of Board, Date, 8-13-47, 7-21-48; Parole Rel. xxx; War. is., xxx; Releases and recommitments on present sentence other than parole, Date, 7-28-45; Method, Tr. to USP-L, as No. 62119-L.

[fol. 51] RESPONDENT'S EXHIBIT "B"

Record of Court Commitment

United States Penitentiary, Atlanta, Georgia

Inst. Name, Charles Gioe; No. 63774; Alias, Charlie Joy, Charles Joye, Charles Veltre; Color, White; Age, 44, 2-6-04; True Name, Charles James Gioe; Offense, P. V. Conspiracy to Interfere with Trade & Commerce by Violence, Threats & Coercion; District S-NY-New York; Cr. 114/101; Sentence, 10 years; Fine, $10,000.00, Paid 5-14-45; Sentence changed July 23, 1948; New term, 2398 Days; Reason therefor, In custody as P. V.; Sentenced, *Dec., 31, 1943; When arrested July 23, 1948; Committed to Fed. Inst., Apr. 4, 1944, Jul. 24, 1948; Where arrested, Chicago, Ill.; Sentence begins *Mar. 8, 1944-Jul. 23, 1948; Residence, Chicago, Ill.; Time in jail before trial, Since arrest; Expires full term, Feb. 14, 1955; Former com. on sentence to other institutions, *12-31-43: Appealed; *3-8-44; Elected to serve sentence pending appeal; Releases and recommitments on present sentence other than parole, Date, 7-28-45; Method, Tr. to USP-L as No. 62121-L.

Note: Response to order to show cause, Judgment and commitment, Election to serve sentence, Warrant and Order to show cause omitted—See No. 2329 Habeas Corpus.

[fol. 52] EXHIBIT "C-1" IN RESPONSE ALSO USED AS PETITIONERS EXHIBIT 11

Referral for Consideration of Alleged Violation

To: United States Board of Parole:

Date July 21, 1948.

Case of Charles Gioe; No. 62121-L; Sentence 10 years; District from Southern New York; Original offense—Violation of Anti-Racketeering Act, Title 18, Section 420-A, U. S. Code; Sentence began March 8, 1944; Released August 13, 1947; District to Northern Illinois; C. R—(or) Parole X; Violation date Divers occasions since release; Termination date March 7, 1954.

Present offense:

1. Change of employment without permission.

2. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

3. Association with persons of bad reputation.

4. Failure to conduct himself honorably.

5. Failure to give a proper accounting of income and expenditures.

Warrant ordered by: —— ——, Signed by: —— ——.

Received—Record Office, Jul. 24, 1948. U. S. Penitentiary, Atlanta, Ga.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER PERMITTING PETITIONER TO TRAVERSE RESPONSE—Filed September 20, 1948

The foregoing Response having been filed to Order For Respondent To Show Cause Why Petition For Habeas Corpus Should Not Be Granted, it is

Ordered that a copy of the Response and of this Order be served upon the petitioner and that he be permitted to

traverse same on or before September 27, 1948 or else the same will be taken as true.

This 20 day of September, 1948.

E. Marvin Underwood, United States District Judge.

[fol. 54] EXHIBIT "A"

District Court of the United States, Southern District of New York

C. 114/101

UNITED STATES OF AMERICA

vs.

LOUIS COMPAGNA, alias Louis Cook, alias Lefty Louie, alias Little New York

Violation of U. S. C. Title Secs. 2 (a) (b) (d) of Act of Congress Approved June 18, 1934, c. 569, 48 stat., 979 USC, Title 18 Sec. 420 (a) (b) (d), known as anti-racketeering Act. Conspiracy to interfere with trade & commerce by violence, threats & coercion.

JUDGMENT AND COMMITMENT

On this 31st day of December 1943, upon the proceedings heretofore had herein and on motion of the United States Attorney, it is by the Court

Ordered and adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of ten (10) years and fined $10,000.

It is further ordered that defendant stand committed until fine shall be paid or until he shall otherwise be discharged according to law.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States [fol. 55] Marshal or other qualified officer and that the same shall serve at the commitment herein.

John Bright, United States District Judge. (Seal.)

Note: Exhibit "A" Judgment and Commitment (Charles Gioe) omitted, same as Louis Compagna.

Return

I have executed the within judgment and commitment in the manner following: On Dec. 31, 1943, I delivered said Louis Compagna to the Warden of New York City Prison, Temporarily pending transfer to the institution herein designated for the service of sentencing; and on ——, 19—, I delivered said Louis Compagna to the Warden at U. S. Pen. Atlanta, Ga. the institution designated, together with certified copy of the within Judgment and Commitment.

James E. Mulcahy, U. S. Marshal.

Notice of appeal filed Dec. 31, 1943.

[fol. 56] The United States District Court for the Southern District of New York

C. 114/101

United States of America

versus

Louis Compagna

I hereby elect to enter upon service of my sentence of 10 years, in such institution as shall be designated by the Attorney General for such service. It is understood that this election precludes release on bail.

Louis Compagna.

March 8th 1944.
H. G. Siess, (Witness).

[fol. 57] EXHIBIT "C" IN RESPONSE, ALSO USED AS PETITIONER'S EXHIBIT No. 8

Department of Justice, Washington, D. C., U. S. Board of Parole,

Department of Justice

Warrant

THE UNITED STATES BOARD OF PAROLE

To Any Federal Officer Authorized To Serve Criminal Process Within the United States:

Whereas, Louis Compagna, No. 62119-L was sentenced by the United States District Court for the Southern District of New York to serve a sentence of ten years, — months, and — days for the crime of Violation of Anti-Racketeering Act, Title 18, U. S. Code, Section 420-A, and was on the thirteenth day of August, 1947, released on parole from the United States Penitentiary, Leavenworth, Kansas

And, whereas, reliable information having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice;

Now, therefore, this is to command you to execute this warrant by taking the said Louis Compagna, wherever found in the United States, and him safely return to the institution hereinafter designated.

[fol. 58] Witness my hand and the seal of this Board this 21st day of July, 1948.

Fred D. Rogers, Member, U. S. Board of Parole.
(Seal)

United States Marshal's Return to United States Board of Parole

NORTHERN DISTRICT OF ILL. ss:

Received this writ the 22 day of July, 1948, and executed same by arresting the within-named Louis Compagna this 23rd day of July, 1948, Chicago, Illinois, and committing him to U. S. Pen. Atlanta, Ga., July 24-48.

T. P. O'Donovan, U. S. Marshal, by Albert Nobleus, Deputy Marshal.

[fol. 59] EXHIBIT "C-1" IN RESPONSE, ALSO USED AS PETITIONER'S EXHIBIT No. 10

Referral for Consideration of Alleged Violation

To: United States Board of Parole.

Date July 21, 1948

Case of Louis Compagna, No. 62119-L
Sentence 10 Years—District from Southern New York
Original offense, Violation of Anti-Racketeering Act, Title 18, Section 420-A, U. S. Code
Sentence began March 8, 1944 Released August 13, 1947
District to Northern Illinois C. R. (or) Parole x
Violation date Divers occasions since Termination date March 7, 1954 release

Present offense:

1. Failure to reveal source of monies used in Settlement of Internal Revenue tax, when questioned before a legally constituted body.

2. Failure to conduct himself honorably.

3. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

[fol. 60] Note: Clerk's Certificate omitted.

EXHIBIT "D"

31 Memo to Clk—paymt fine

File No. 86447

Docket No. C114-101

Date: May 14, 1945

Memorandum to the Clerk of the United States District Court for the Southern District of New York

Re: United States of America v. Louis Compagna

There is now handed you the sum of $10,000 on account of a $10,000 fine entered as a judgment on the 31st day of December, 1943 against the above-named defendant.

There is now a balance due in this matter in the sum of $ None.

Nora Gillespie, Assistant U. S. Attorney.

$10,000 Paid May 14, 1945, —— ——, Deputy Clerk.

Note: Judgment and commitment omitted.

[fol. 61] Note: Clerk's Certificate omitted.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SOUTHERN DISTRICT OF NEW YORK, ss:

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oaths present:

That heretofore, to wit, on or about the 18th day of June, 1934, and continuously thereafter to and including the date of the filing of this indictment, in the Southern District of New York and within the jurisdiction of this Court, Frank Nitto, alias Frank Nitti, Louis Compagna, alias Louis Cook, alias Lefty Louie, alias Little New York, Paul de Lucia, alias Paul Ricca, Phil D'Andrea, Francis Maritote, alias Frank Diamond, Charles Gioe, alias Charlie Joy, Ralph Pierce, John Rosselli, and Louis Kaufman, hereinafter referred to as the defendants, together with George E. Browne, William Bioff, alias Willie Bioff, and Nick Circella, alias Nick Dean, not indicted herein but hereinafter referred to as the confederates, and divers other persons to the Grand Jurors unknown, in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other to obtain and to attempt to obtain by the use of and attempt to use and threat to use [fol. 62] force, violence and coercion, the payment of money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors

unknown, from a group of corporations, including Loew's Inc., Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures, Inc., and other firms, persons and corporations whose names are to the Grand Jurors unknown, all of the aforesaid being hereinafter referred to as the victims, and to obtain the payment of said money and said other valuable considerations, said moneys and said valuable considerations being the property of the aforesaid victims, with the consent of said victims induced by wrongful use of force and fear.

That this prosecution has been commenced upon the express direction of the Attorney General of the United States.

That said Browne and Bioff, confederates herein, during the period hereinbefore set forth, were and are connected with a labor union, to wit, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, hereinafter called the IATSE, in the capacity of president and personal representative of the president, respectively.

That said Circella, confederate herein, and said Kaufman, defendant herein, during the period hereinbefore set forth, were and are connected with a labor union, to wit, the IATSE, in the capacity of international representative of the IATSE, and business agent of Local 244, affiliated with the IATSE, respectively.

That during the period hereinbefore set forth, the vic-[fol. 63] tims were and are engaged in trade and commerce between States and with foreign nations, in the District of Columbia and in territories of the United States, that is to say, said victims are in the motion picture business engaged in world-wide and nationwide, foreign and interstate trade and commerce in the production, distribution and exhibition of motion pictures, directly and indirectly through subsidiary corporations and various agents and contractors.

That it was a part of said conspiracy that Frank Nitto, Louis Compagna, Paul de Lucia, Phil D'Andrea, Francis Maritote, Ralph Pierce, Charles Gioe and John Rosselli, defendants herein, together with divers other persons to the Grand Jurors unknown, would dominate, control and direct the operations of said labor union, to wit, the IATSE.

That it was further a part of said conspiracy that said defendants and said confederates, during the period hereinbefore set forth, would obtain and attempt to obtain, by the use of and attempt to use and threat to use force, violence and coercion, the payments of money, to wit, upwards of $1,000,000 and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, and would obtain the property of the aforesaid victims with the consent of the aforesaid victims, induced by wrongful use of force and fear, that is to say, by demanding that said victims pay over to said defendants and said confederates the aforesaid sums of money and other valuable considerations for protection, viz., to prevent and dissuade said [fol. 64] defendants and said confederates from restraining, impeding and obstructing the production, interstate distribution and exhibition of motion pictures of the aforesaid victims throughout the United States, and otherwise injuring and destroying and attempting to injure and destroy the business of said victims.

That it was further a part of said conspiracy that said defendants and said confederates, by use of the position, power, influence and control of said defendants and said confederates and each of them in and over said IATSE, would obtain and extort money and other valuable considerations, in the amount and by the manner and means heretofore set forth from said victims for the said defendants' and said confederates' own use and benefit; against the peace of the United States and their dignity and contrary to the form of the statutes of the United States in such case made and provided (Section 2(a) (b) (d) of the Act of Congress approved June 18, 1934, c. 569, 48 Stat. 979, United States Code, Title 18, Section 420a (a) (b) (d), commonly known as the Anti-Racketeering Act).

Mathias F. Correa, United States Attorney.

[fols. 65-98] Back or Cover of Indictment. C 114-101. U. S. District Court. The United States of America vs. Frank Nitto, alias Frank Nitti, Louis Compagna, alias Louis Cook, alias Lefty Louie, alias Little New York, Paul de Lucia, Alias Paul Ricca, Phil D'Andrea, Francis Maritote, alias Frank Diamond, Charles Gioe, alias Charlie Joy, Ralph Pierce, John Rosselli, and Louis Kaufman, Defendants.

Indictment. Conspiracy to interfere with trade and commerce by violence, threats and coercion. (Viol. Sec. 2(a) (b) (d) of Act of Congress, Appvd. June 18, 1934, c. 569, 48 Stat. 979, U. S. C. Title 18, Sec. 420(a) (b) (d), known as Anti-Racketeering Act.) Mathias F. Correa, United States Attorney.

A True Bill: David C. Thomas, Foreman. U. S. District Court. Filed Mar. 18, 1943. S. D. of N. Y.

[fol. 99] In United States District Court

[Title omitted]

Amendment to Response to Order for Respondent to Show Case Why Petition for Habeas Corpus Should Not Be Granted—Filed October 25, 1948

Now comes the respondent in the above entitled habeas corpus proceeding by his counsel, the United States Attorney for the Northern District of Georgia, and by leave of Court amends his Response and affirms:

(a) That he is without knowledge whether perjury was committed in the conviction of the petitioner herein, or whether the Court for the Southern District of New York lacked venue, but that these are matters which might be raised by appropriate motion before the said trial court pursuant to the last paragraph of Section 2255, Title 28, U. S. C., as amended, effective September 1, 1948.

(b) That he is without personal knowledge whether the warrant issued by the United States Board of Parole, under which petition- was taken into custody, was issued capriciously and without reliable information, as alleged by the petitioner, but that the recitation in the warrant that it was issued upon reliable information creates a presumption of regularity and legality. (*U. S. ex rel. Rowe* v. *Nicholson*, (C. C. A. 4), 78 F. (2d) 468; *Story* v. *Rives* (C. C. A., D. C.), 97 F. (2d) 182; *U. S.* v. *Dillard*, 102 F. (2d) 94.)

Further answering, the respondent denies that the Administrative Procedure Act (1946) is applicable in the premises.

[fol. 100] Respondent prays that this his amendment be ordered allowed and filed.

J. Ellis Mundy, United States Attorney; Harvey H. Tysinger, Assistant United States Attorney; A. E. Gottshall, Attorney, Department of Justice, Washington, D. C.

[fol. 101] In United States District Court

[Title omitted]

Order Allowing Amendment—Filed October 25, 1948

The foregoing Amendment to the Return of Respondent having been presented, read and considered, it is

Ordered that the same be filed and allowed subject to objections.

This 25th day of October, 1948.

E. Marvin Underwood, United States District Judge.

[fol. 102] In United States District Court

[Title omitted]

Traverse to Response

75. Now comes Louis Compagna and begs leave to have your Honor regard his sworn petition, and the first amendment thereto, as an affidavit to be considered, in passing upon the preliminary question, as to whether a writ should issue.

76. It will be noticed that the parties are in agreement as to many matters including the following:

a. The New York judgment is regular on its face and has been affirmed.

b. Parole was granted, accepted and entered upon in due form, in good faith on the part of all concerned in regular course.

c. A warrant for violation was issued and served. Petitioner is in custody by virtue of this warrant, coupled with the judgment of conviction.

d. The Parole Board has held, what is termed by them as a hearing, and no disposition has been made.

77. This leaves important matters in dispute, which matters might be divided roughly into a dispute as to the law involved and a probable controversy as to the facts. Differences as to the law are discussed in our brief herewith.

78. In conformity with the order of Court that we traverse the Response or else the same will be taken as true, your petitioner states that:

[fol. 103] 79. Your petitioner denies as said in the Response, that the record made in New York, together with the action of the Parole Board in issuing the warrant, prove that petitioner is legally in custody for the reason that the record is silent as to the knowing use of perjury and other defects now asserted against its validity. The issuing of the warrant and the action of the Parole Board proves nothing without consideration of the circumstances alleged in the petition. Respondent has failed to meet the real issue and appears to take the position that the judgment is valid and the warrant good, regardless of the facts. We find no denial in the Response to the effect that perjury was used as alleged, or that the New York Court had no jurisdiction because of lack of venue. Nor do we find any denial in the Response that the warrant was arbitrarily issued in the absence of evidence.

80. It is true as stated in the Response that there is no evidence in the New York record that the conviction was based upon perjury knowingly used. We seek to show that fact outside of the record.

81. The Response states that the record shows a parole violation, which is denied by petitioner.

82. The Response alleges that final Administrative action has not been taken. Petitioner states the fact to be that the so-called warrant is a commitment and as such is final.

83. Conclusions to be found in the Response, as to whether the Administrative Procedure Act applies and habeas

corpus is a proper remedy, are left to argument and the brief.

84. Two shorthand reporters were present when your [fol. 104] petitioner appeared before the Board. Your petitioner requests that a transcript be produced here for the purpose of bringing the facts before your Honor. Your petitioner has requested of the Board by letter that this transcript be furnished at the expense of your petitioner, but up to this date no reply has been received.

85. Your petitioner prays that the writ issue and that he be afforded a hearing as to the facts and the law.

Louis Compagna.

Louis Compagna, being first duly sworn, states that the above traverse by him signed is true.

Louis Compagna.

Subscribed and sworn to before me this 24 day of September, 1948. T. C. Kindel, Notary Public. (Notarial Seal.)

[fol. 105] In United States District Court

[Title omitted]

Order Granting Writ—Filed September 27, 1948

Upon consideration of the above case on petition, response and traverse thereto, it is considered, ordered and adjudged that writ of habeas corpus issue as prayed, returnable before me at Atlanta, Georgia, at 10:00 o'clock A. M., on the 25th day of October, 1948, and from day to day thereafter until discharged by the Court.

This the 27th day of September, 1948.

E. Marvin Underwood, United States District Judge.

[fol. 106] In the District Court of the United States for the Northern District of Georgia, Atlanta Division

H. C. 2329

Louis Compagna

versus

W. H. Hiatt, Warden U. S. Penitentiary, Atlanta, Georgia

H. C. 2330

Charles Gioe

versus

W. H. Hiatt, Warden U. S. Penitentiary, Atlanta, Georgia

Before Honorable E. Marvin Underwood, Judge
Sept. 27, 1948

Reporter's Transcript of Hearing

Appearances

For the Petitioners: Wm. Scott Stewart, Esq., Chicago, Ill.; M. Neil Andrews, Esq., Atlanta, Georgia.
For the Respondent: H. H. Tysinger, Asst. U. S. Attorney.

By Mr. Andrews: If Your Honor please, I wish to introduce Mr. William Scott Stewart, of Chicago, of the Chicago [fol. 107] Bar. Your Honor will remember that some two weeks ago we spoke to Your Honor of the writs of habeas corpus in these cases. Today the traverse is filed, and Mr. Stewart would like to address the court with respect to it, and a hearing time with respect to the same.

By the Court: All right. What case is that?

By Mr. Andrews: It's Compagna and Gioe.

By the Court: All right. Well, I will hear this now.

By Mr. Stewart: The question before Your Honor as I understand it, is whether the writ is to issue, and the procedure has been adopted, and the rule entered. The Government has respondent, and we traversed, and filed the brief with reference to that.

The question before the Court this morning, as I understand it, is whether the Court will issue the writ. The men are here in the Penitentiary, and very briefly the situation

is that the Board has held what they call a hearing. We differ as to the legality of that hearing in our construction of the statute, and we think it is supported by Fleming versus Tate in the Circuit Court of Appeals in Washington.

A hearing should be just what it means, and that is not just a physical appearance of a person before the Board. A hearing is of no effect unless the man has a right to counsel, and has a right to produce witnesses, and hear witnesses that are against him, or whatever the evidence might be. But in accordance with the usual custom of the Board, this hearing, as they call it, constituted a cross examination of these prisoners, and there was nothing new developed. We have talked with the prisoners since the so-called hear- [fol. 108] ing, and I wrote a letter to the Board asking them if they wouldn't furnish us with a transcript at their expense—two court reporters were present—they wrote back and said they regarded their records as secret and a transcript was not available to me. Well, that is consistent with their general attitude toward their duty, as they see it. They believe they have power to do as they please. And we take the position in this petition, Your Honor, that this warrant in the first place was arbitrarily issued without any evidence at all, and we are prepared to show on a hearing, and we can show the result of this so-called parole hearing, we can show that by the prisoners themselves. And we expect to show Your Honor, they have no evidence, it isn't a question of having something that they might be mistaken about, or they may draw a wrong conclusion about, they just have no evidence at all. They have no evidence of any violation. We take the position that these men have not violated their parole. They were on parole and they were taken back with a warrant that was issued just for political purposes. It was issued because of a Congressional hearing into the question of whether or not they should have been granted parole in the first place, and the Congressional hearing was dominated by some Republican Congressmen and they are generally endeavoring to make political capital out of trying to make it appear that the Parole Board were in error in giving parole in this case. They have not been able to substantiate the charges. There was nothing improper about the granting of the parole, and the Parole Board members were before the Congressional hearing, and they testified, and answered questions, and explained the methods and manner in which the paroles

were issued, and the paroles were issued in good faith, and the Parole Board now doesn't claim there is anything [fol. 109] wrong about the issuance of the parole. They have written me a letter saying they don't intend to recall the paroles, or take back the decision on giving the parole. That's what the Congressmen tried to get them to do, but they won't do that. So they hunted around, and hunted around, to try to find some claim upon which to claim a violation. If I could say with reference to their judgment, I think they used bad policital judgment, but that is for them to say, they have used, somewhere, somebody in Washington has, in governing the policy in this case, and that is to put these people behind bars, whether they have any reason or not.

Now, our position, Your Honor, is that they have no evidence, and all we want is a chance somewhere to show that in court. All we want is a hearing, and when we presented this petition to Your Honor, that's all we asked for, and that's what we are asking for now.

By the Court: Aren't you proceeding the wrong way? In other words, it seems to me you say that you are not asking for any discharge, you are asking for a review of the hearing before the parole board. Now, I don't understand that that is the function of a habeas corpus case, a writ of mandamus, or something of that kind might be the proper remedy, but suppose your contentions are supported, and the Court finds in your favor, he wouldn't turn them out, he would just simply direct the Board to give you a constitutional hearing.

By Mr. Stewart: May I answer Your Honor's question, because it goes to the very meat of the whole matter, and it touches on the very difficulties we have had in this proceedings. This is not the only one. The Government takes the position somewhat -long the line Your Honor suggests, but [fol. 110] the weakness of that position, Your Honor, is this: that ordinarily that if the Board were proceeding in good faith, if they had what they believe to be reliable evidence, even if it were to turn out later they were mistaken, if they were proceeding in good faith, and had something, then of course the prisoners would have to exhaust all their administrative remedies, the administrative proceedings, but here you have a spectacle of the administrative procedings being purple-clad. They have two members of the Board here in Atlanta, and two members of the Board cross-

examining these prisoners. There is no reason in the world why they couldn't have announced right then and there whether or not there had been a violation. So we go back, Your Honor, and here is our position with reference to Your Honor's jurisdiction, we go back to the issuance of the warrant itself, and we take the position, and we say in our sworn petition here, and it seems to me the form is unchallenged because the Government is just satisfied to rest on the legal proposition, but we take the position as a matter of fact that the members of the Board just reached up and got one of these blanks and signed it. Now that sort of thing, without any evidence, is an aritrary use of power. The warrant amounts to a commitment. It is not a warrant, it is a sort of misnomer, call it a warrant, it is a paper by which the marshal goes over and gets the people and puts them in the Penitentiary, in what is called "Quarantine."

By the Court: Is a copy of the warrant set out in the pleadings?

By Mr. Stewart: Yes, Your Honor, it follows a form of the statute, and it is set at the end of the petition, and it [fol. 111] states "upon reliable information this warrant is issued."

Now, in our petition we say they have no information, and it is just like if the Parole Board would reach up into the book of forms and fill in any name, with the name of the Judge here, or anybody. And that is our position, that it is not right to issue that sort of paper, to take away the liberty of a person arbitrarily and capriciously, and the Court always has the power to look into such a charge.

We have a Supreme Court case or two on it. You take the Immigration authorities, that is an administrative body, and ordinarily they should be allowed to go ahead and proceed with their administrative proceedings, but if a man goes off to another country on a visit, if I should go to Europe, and on my way back they stopped me with one of those warrants, and put me on Ellis Island, I could point out I was born in this country, I was a citizen of the United States, I don't need to wait while they finish their administrative proceedings. That is our position here, if the Parole Board can just reach into the files and pull out a blank and put in the name of the prisoner, the court can't look into it, and look behind it, you are giving a body of men a power that is greater than Hitler ever had under his dictator form of government. Our Government is

not based that way. Our Government doesn't allow the Parole Board to just reach into a file and pull out a paper and put somebody's name on it because it might displease somebody.

Our position, we make no bones about it, we make the charge, and we expect to substantiate it because we are making it in a court of law, and under oath, and the only defense that has ever been interposed has been, "well, wait [fol. 112] a while, you should wait," and you wait until they get through with what they are doing. But how long have we been waiting? We have been waiting since July. We have been waiting eleven months on some of the things. They go back to an airplane trip, they claim there must be something wrong about it when the men were released on parole, fantastic things like that. They have nothing. Ordinarily, I understand Your Honor has considerable experience in these matters because of the location of the prison, and Your Honor knows that ordinarily the Parole Board tries to work with the prisoner, with the Court, with the Prosecutor, with everybody, to try to bring a man back, and allow him to have a chance after he is on parole. That ordinarily is the situation. So because of that, a certain policy toward these cases has developed in the decided cases, and that is that the Parole Board should be allowed considerable discretion, and considerable leeway, and considerable time to finish what they started to do, so long as they act properly. But the moment you find yourself in a case where they are just using that power, that they have, and we make that charge—now whether we can substantiate it or not, of course Your Honor has to see from the evidence—but we make the charge, and the statute, Your Honor knows, and you will remember when I remind you, the statute doesn't give the Board a right to issue a warrant when they feel like it. The statute says when they have reliable information, reliable evidence, they should issue the warrant.

By the Court: Well, the warrant so states that they have.

By Mr. Stewart: Your Honor can inquire into that and go behind it.

[fol. 113] By the Court: That gets down to the very issue in this case, as to whether or not this can be done in a habeas corpus proceedings.

By Mr. Stewart: All right, that is a thing I would be glad to meet, and I think we have a right to do it, because if we can't do it here, we can't do it anywhere.

By the Court: Well, I will hear your authorities.

By Mr. Stewart: All right, Your Honor. I will have to draw parallels, you see, and I do have this case which is a decided case, and that is, you take the military cases, for instance, whether or not a person is a minister of God under the Jehovah's Witnesses. You know that has been contraverted over and over before the courts. The question arises at the very threshold of those cases, as to what the status of the person might be, and that is proper in an inquiry in a habeas corpus proceedings, what is the status of these people, Compagna and Gioe. Are they parole violators, or are they people who are entitled to remain on parole. That is the question here.

Now, you take the administrative proceedings with reference to aliens. If the government authorities detain a person, and issue their warrant claiming that the person has done something since he obtained his citizenship, which forfeits that right, ordinarily that citizen might have to wait, a naturalized citizen might have to wait until they finished with their administrative proceedings. But if he goes into court, and claims they had no right to issue the warrant in the first place, and that it was done arbitrarily, it is proper for the court to look into that question, and we will bring it down, Your Honor, to a parole case, and here is this sort of case. A man was on parole, and a tele-
[fol. 114] gram was sent, and a letter was written, the Attorney General directed the federal agents to pick the man up because they had understood he had violated, and they took him to a prison to face a hearing, but they didn't have any parole warrant at all, Your Honor, it was back in the days before they changed the law with reference to the Warden being on the Board, and they were supposed to take him back to the prison where he had been paroled from. They didn't do that. They took him to the wrong prison, and didn't have a parole warrant at all. Later on they discovered that because the man complained by way of habeas corpus. So in order to try to correct that, they took him over to the right prison, held another hearing, and declared that he had violated. Then by habeas corpus he went into court, and the Circuit Court of Appeals said there is no force to any of these proceedings because they didn't have a proper warrant, and a warrant is jurisdictional,——

By the Court: What kind of case is that?

By Mr. Stewart: That is a Circuit Court of Appeals case.

By the Court: I know, is it a naturalization case?

By Mr. Stewart: I am talking about a parole case now.

By the Court: Well, what was it, how was he committed?

By Mr. Stewart: He was committed originally on a letter or telegram from the Attorney General directing——

By the Court: I mean what was he charged with?

[fol. 115] By Mr. Stewart: Some violation of parole. He really——

By the Court: I am talking about in the first instance, how did he get in the penitentiary to start with?

By Mr. Stewart: Well, my memory fails me on that. That wasn't the question.

By the Court: What I am trying to get at, was it an immigration case or something like that?

By Mr. Stewart: No, no, it was conviction of a crime, Your Honor.

By the Court: Suppose you get that case.

By Mr. Stewart: All right, my memory is Moore versus White. I have it here. 23 Federal Second, 467.

By the Court: I was just looking over your prayers. It seems that the only prayers which are proper in a habeas corpus proceedings are maybe the first two. The others seem to me to come under a different heading, to be a procedure in the nature of a mandamus, or some action of that kind. Now, the two in question, the two that seem, that may raise an issue in a habeas corpus proceeding, are first, to ask this court to declare the New York judgment void. Now is that the original sentence?

By Mr. Stewart: Yes, Your Honor.

By the Court: Do you set out the reasons why you say it is illegal, the first sentence?

By Mr. Stewart: Yes, Your Honor. We state in our sworn petition it is based upon evidence known to be perjury by the prosecution at the time of its use, and the allegations of the indictment in New York were false, and [fol. 116] known to be false at the time it was alleged in the indictment and stated to the grand jury; that they used accomplices as witnesses and these defendants have always maintained that they are not guilty of this crime.

By the Court: Well, if——

By Mr. Stewart: The man whom the Government used,

the men whom the Government used were from Chicago, and they went before the grand jury in New York and told the same story that they told on the stand before the jury, and the record shows it is the same story they told, and the conspiracy, if any existed, was formed in a suburb of Chicago, in Riverside.

By the Court: Well, I think that ground is sufficient to establish an issue in a habeas corpus proceedings.

By Mr. Stewart: There can't be——

By the Court: If the conviction was based on perjured testimony known at the time to have been perjured by the prosecuting officer, and I understand you are charging that——

By Mr. Stewart: That is our charge.

By the Court: Well, the next is that the Court declare the warrant void as having been issued contrary to law. You mean the parole violator warrant?

By Mr. Stewart: That's right, Your Honor. Now, I would like to be heard, if I may, just a little more on that. I have the case——

By the Court: Yes, I'll hear you on that second point.

By Mr. Stewart: Now, the case I referred to just [fol. 117] in passing when we were interrupted, is Moore versus White, 23 Federal Second, 467, and this is a rather significant case, and in order to bring the matter clearly before the Court, I want to remind the Court that the law has been changed, you know there was a time when the Board of Parole was different for each penitentiary, that the Warden and the medical officer sat on each board in each penitentiary. But the statute was the same, that is the violator warrant was issued under the same statute, and the statute provided that when a member of the board, or the warden, the statute is still the same, still just the same language, or the warden, but the law has been changed, and there is only one board, and that is in Washington, and they are appointed under the Department of Justice in a general way. So the significance of this case is that the authorities proceeded under a telegram which is set out and the very question that is troubling Your Honor troubled the trial court. The trial court refused to issue a writ of habeas corpus in this case, and the Circuit Court of Appeals reversed that decision, and said the habeas corpus is proper. Here are the facts, Your Honor. The telegram

was sent out and it is set out in the opinion: "Department advised federal prisoner Lawrence B. Moore Parole violator in custody special agent Danville Illinois, instructed take custody of prisoner and deliver to Federal Penitentiary, Leavenworth, Kansas." And under that telegram the man was taken to Leavenworth, Kansas and the Attorney General sent another telegram to the Penitentiary at McNeil Island, and said, "Forward Commitment Lawrence D. Moore Parole Violator to Warden Leavenworth Penitentiary."

By the Court: Well, there was no warrant in that case at all?

[fol. 118] By Mr. Stewart: There was no warrant at all.

By the Court: Well, there is a warrant in this case here.

By Mr. Stewart: That is true, but you see, we have to take these things one at the time, and that is if I can show Your Honor a case where they had no warrant at all, then they held this so-called hearing, and revoked the parole, and the Court went back, the Circuit Court of Appeals said the proceedings amount to nothing, because the warrant is jurisdictional, you must have a warrant. It is just a matter of construing this statute, Your Honor, because the word "warrant" might be misleading, if I didn't argue it a little bit—of course Your Honor hears a number of cases, and I have to go back to fundamentals and tell Your Honor these things. Your Honor knows every lawyer has to do that, but in order to avoid confusion, let's dismiss from our minds entirely the warrant that was issued. In the Constitution they have to have probable cause, and it has to be issued properly out of a court, and it places a man on trial, there is a certain body of law with reference to those warrants, and we are not talking about that kind of a warrant, because there are certain privileges a person has against not being arrested that do not apply here, we are not talking about that, and of course the biggest thing a person is apt to be confused about, a lawyer, and a pretty good lawyer, too, is this general law with reference to warrants. Once you get a man into court, if you had a man facing trial, under indictment in this district, and you are about to call a jury, and his lawyer steps up, or he steps up himself, and wanted to complain about how they got him from over in Louisiana some place, that they kidnapped him, or something, Your Honor would give

[fol. 119] the answer in the books, that is, it doesn't make much difference how you got here, you are here, and here is the indictment, we have jurisdiction of you, and we are going ahead with the trial and call the jury. That is the law, but that isn't the law when it is a parole violator warrant, because a parole violator warrant is a step in the statute toward proceedings. Now, I would like to go back to the beginning, if I may, because I find that some of these propositions are a little bit difficult to accept because people don't start from the beginning and consider what we have to consider here. I think it can be understood best if I just say they didn't need to have any parole laws at all, I mean Congress didn't need to have a parole system, and they could have set up some different sort of system than they have. But we have the one that we have, and that is under the statute, and we must look to the statute to find out what it is that Congress intended. Now, that is the only fundamental, and I go back to the probation law, if I may, because I have a Supreme Court case to illustrate my position, and probably Your Honor will recall the case when I give you the facts briefly. The man was on probation, and he violated his probation, and the judge listened to the probation officer, and issued a revocation, and signed the necessary papers for the probation officer to go out and get the man and take him and put him into the Penitentiary. Well, that wasn't proper, because the statute provides that that man shall be brought in to court, and the judge should hear what the complaint is against him with reference to a violation, and after that hearing, then he can be sent to the penitentiary under the original judgment. In other words the Supreme Court of the United States said the statute gives this man a right to this hear-[fol. 120] ing, and the authorities, including the court, must proceed according to the law. Now——

By the Court: But it didn't say the probation officer should not bring him into court.

By Mr. Stewart: That is true, that is true.

By the Court: That's all this warrant is, just says you may bring this man before the Parole Board for a hearing.

By Mr. Stewart: That's right, Your Honor. That is all I want to get, is the fundamentals. First, I want to get to, the case holds if they don't have any warrant at all, that their proceedings are all a nullity. So they must have a warrant in order to have jurisdiction. So the moment

you accept that, that is a promise you must have a legal warrant. You can't have a warrant issued just because somebody has a whim and wants to lock up a man. If that were true, you could lock up a man because he didn't vote the Republican ticket, or because you didn't like the religion he belonged to. Our Government is not conducted that way, and the only place the man can complain is in court, and he doesn't need to wait while they go ahead with some administrative proceedings, if they are proceeding arbitrarily.

Now, going back to the law of writ of habeas corpus, we don't need to point to any particular statute, though we do have a statute that gives the federal courts jurisdiction of habeas corpus. But they just use the expression, and Your Honor, as a judge, and Your Honor as a lawyer, knows what is meant by writ of habeas corpus. So the writ is proper to go into the legality of custody. Now, this question very often arises about how long a person must [fol. 121] wait. But we have a very important case which I cite in the brief, and it is very recent authority from the Supreme Court of the United States, and that is the Estep case. Your Honor may remember, and I take it Your Honor probably had these draft board cases along with all the other habeas corpus matters that come before a district court, there was a time even the Supreme Court of the United States, in the Falbo case, said that on these draft people you have to wait until they go through all the administrative proceedings, to wait until they get into the Army camp, to wait all that length of time, but they, Judge Murphy and a few of the other judges of the Supreme Court of the United States, saw the injustice of that, and here is the expression they use, and I quote from my brief, because it is short, said the court did not have to march up hill if they are going to have to march down again. People don't have to wait until the administration works, if you see that it is wrong to start with. So our position is here that the Parole Board is only administering a judgment of the court to start with, they are not sentencing the prisoners—they get the notion that's what their function is, but it isn't—Your Honor knows better than that. The Parole Board merely administers judgment, and it just has written in it the parole statute, every time a man is sentenced by Your Honor it is just as fully as if the clerk extended it in the record, all the parole statute is there.

Now, the statute doesn't say when the parole board feels like it that it shall issue a warrant, or when the parole board in its discretion believes a man might have violated, they may issue a warrant. The statute says when they have reliable evidence, they issue the warrant, and they recognize that in their warrant, they recite that they have [fol. 122] reliable evidence, and therefore they have issued this warrant.

Now, we get down to another branch of Your Honor's question: Are we bound by that recital? Of course, if we are bound by that recital there, no warrant can ever be questioned in court, and that, if I understand the great writ of habeas corpus properly, if a prisoner comes in and complains to Your Honor that they have issued some sort of warrant against him and they have no right, he was not even on parole—let's take a man that was not even on parole. Why, he can question this, because he is questioning his status, and questioning the legality of the action of the board, and if he comes before the court and says, I was on parole, and I have a right to remain on parole so long as I held up my end of it, and behaved and reported to my parole adviser, and parole officer. That's our case here, and Mr. Lyons, who was an attorney for the United States, and who is respected, and has a great deal of ability and experience, was examined by this Congressional Committee, and he said, as we all know that these men have a right to liberty on parole until they break it, until they violate it, and nobody has a right to put them back in the Penitentiary without any cause. And so that is what they are doing.

And so the legal question seems to me to be simple, and that is that nobody need to wait until another state of proceedings, and Judge Murphy, in the case I cited to Your Honor, the Estep case, says, it is a strange sort of Government that requires a man to go through a lot of things and get miles from home before he can petition the court. We don't need to question what might have been done. We have to consider the case before us now, not what a man [fol. 123] might have done. That's what Judge Murphy says in the Estep case. In those cases the Government comes in and says, this is premature, the man should wait until the military authorities have him and try him for being a deserter; if he is not properly classified and properly proceeded against, the court can inquire into it.

By the Court: Have you a reference to the parole statute about violators?

By Mr. Stewart: Yes, Your Honor.

By the Court: I would like to get the statute.

By Mr. Stewart: I have it quoted in the trial brief, Your Honor. Title 18 of the Code, last volume of Title 18, section 716.

By the Court: As I recall the statute, it is to the effect that where a person is charged with violation of his parole, not that it is proven against him, but if he is charged with violation of his parole, a warrant may issue, and he is returned to the institution where the board should give him a hearing, as early as convenient, or something to that effect. Now, the effect of that statute would seem to be that it merely restores the operation of the original judgment until the issue can be tried as to whether or not he has violated his parole.

By Mr. Stewart: That isn't true, the judgment isn't restored, he is in an entirely different classification.

By the Court: Upon what theory was he taken back to the penitentiary unless he has not been convicted?

By Mr. Stewart: He is taken back under the statute which provides he should be taken back.

By the Court: And the only way you can take him back [fol. 124] is under the original sentence, until he has an opportunity to show he is not a parole violator.

By Mr. Stewart: It just happens he is not held under the original sentence. He is held under the parole violator warrant. These men are not being held at this moment under their original sentence, and when I wrote the warden preliminary to filing the writ, to send me a copy of whatever papers he was holding the man on, he answered he was referring that to the parole board, because he was holding them at their request. So finally when they did answer, we attach copies to our petition, they are holding the man, not because of the original judgment, but by virtue of this warrant. And if Your Honor will go back and read that statute, you will see it is just a matter of statutory construction of all——

By the Court: It says here "Any officer of any federal prison or correctional institution, or any federal officer authorized to serve criminal process within the United States to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such

prisoner and returning him to said prison within the time specified in said warrant therefor." (Reads from Title 18, Section 718.) Now when a prisoner has been retaken upon a warrant, "He shall be given the opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof."

By Mr. Stewart: That is the statute, that is true, but of course Your Honor will read into that statute it is a legal warrant. I mean our efforts here to obtain a hearing on the question of whether or not they had a right to issue [fol. 125] the warrant at all, and they must follow the statute and you go back a little further, another one just ahead of that, will tell you when they can issue that warrant.

By the Court: This is section number——

By Mr. Stewart: My memory is——

By the Court: With reference to the issuing the warrant.

By Mr. Tysinger: I think it is "six," seven-one-six, Your Honor, right along there, 716 or 717, one.

By Mr. Stewart: 717, title 18, Criminal Code and Criminal procedure, is the statute.

By the Court: It provides that if any member of the parole board shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute same.

By Mr. Stewart: All right——

By the Court: Now, he states in there he has reliable information. He doesn't say it has to be accurate, or absolutely true, but information that he can rely on, then he can have a hearing later on.

By Mr. Stewart: All right, now, I am going to grant everything Your Honor states up to now, when we get ourselves down to any differences, if we have any, for the purpose of this argument. It is whether or not by writ of habeas corpus I am entitled to have Your Honor hear whether they have any or not, when we claim under oath that they have none at all, and they know they have none, [fol. 126] and they arbitrarily issue the warrant. Now that is the sort of thing we are entitled to review by habeas corpus.

By the Court: Let me ask you this question. Suppose the prisoner or defendant, comes into this court and applies for writ of habeas corpus, declaring that a judgment entered in another court was void because there was no evidence to support it.

By Mr. Stewart: Well, Your Honor——

By the Court: That's what you are doing here with reference to a parole warrant.

By Mr. Stewart: No, Your Honor.

By the Court: You are asking the court to declare that warrant is void because there is no evidence to support it.

By Mr. Stewart: No, Your Honor, you are giving me a parallel which doesn't exist, the moment you get into the question of judgments of courts. That is a different field entirely. That is something where the party did have an opportunity to appear before that court, then all Your Honor wants to know is whether or not the other court had jurisdiction. That is an entirely different field of law. Here we are asking Your Honor, Your Honor is a judge, and the only protection people have is that judges do look into these actions of these boards. Now, they are merely administrative boards. They have a right to proceed as long as they proceed properly, and we are not asking Your Honor at the threshold of this case to say that these men should be released from under this warrant, but we do have a right to make this claim, and we make it, in a petition, and we say they have no legal warrant. Now, you know, from Moore versus White, and you know from reading the [fol. 127] statute that they must have a legal warrant, and you know just as a matter of your fundamental common sense about the law, that no official can act capriciously and arbitrarily, and you know there must be a real difficulty at law, so the remedy is by habeas corpus, and the difference, the real difference, I have not heard the judge argue, but I have seen the response, and I have heard other district attorneys argue the matter, the only difference that exists between the two sides of the case was just summed up in Your Honor's question. They said, sure, you have a right to have the court give you a writ, to have the court look into the whole thing, but you must wait and that is the only difference really. But I say in answer to that, we don't need to wait for something that is illegal to start with. They can't give any life to the warrant, breath- life into it by some sort of hearing they hold behind locked doors in

the prison, and we don't need to wait when we claim that the thing they are doing is illegal. They are not giving us the sort of hearing which we are entitled to. Why should we wait for a judgment on the hearing and the verdict when the whole thing is void?

By the Court: Had he had a hearing?

By Mr. Stewart: They have what they call a hearing.

By the Court: Have they handed down a decision?

By Mr. Stewart: They have not handed down an opinion. We filed an amended petition and we claimed in our amended petition, unless Your Honor looks into it, they are not going to give us any answer until after the election, and that alone would give Your Honor jurisdiction, because even if they are proceeding in good faith, which [fol. 128] we say they are not, they should expedite matters. They are going along and dilly-dallying for a purpose of keeping a man confined in the prison when they have no right to keep him there. They have two members of the board, Your Honor, here, and that is a majority of the board, and they could have answered right then, but didn't, and since the so-called hearing, I wrote them and I set this up with reference to having the hearing in the amended petition, and I asked for a transcript, and they said, no, we are not going to give you any transcript. They regard this hearing as secret, and their records as secret. Now, that is in violation of the law, if I understand the law. So the only differences are, the differences will boil down to those the Government will be claiming. I have a right to have Your Honor protect us against arbitrary action, and illegal action, and ill-advised actions by the administrative board, but I must wait until they get through. But while I am waiting, the people are in the Penitentiary, with a number of restrictions that are greater than restrictions put on convicts because they put them in what they call quarantine, and limit them as to their visits more than they do actual prisoners. And another thing, the penalty that follows this, which should follow, if there has been a real violation, is that the good time they have earned since their time before they obtained parole is being taken away from them arbitrarily by this warrant. So we ask Your Honor to look into the thing. If they want to delay, let them delay all they want, but give us a bond, and we would like to have a bond, we have a bond in Chicago, and I think it is only fair,

if a person is charged with such a serious thing. These men received their parole, we set up in our petition, they received it in good faith, they were acting in good faith, I have the wife of Mr. Compagna here, and they are prepared [fol. 129] to show Your Honor under oath here, her husband was in her presence all that time, they were careful, they are not children, they had trouble with the law and didn't want to violate it, they didn't want anyone to think they violated it, and if we can have a hearing, and we can show, and the other side were to attempt to contradict us, they will just resort to some sort of legal or technical argument, but as to facts, we will be able to demonstrate to Your Honor beyond any shadow of a doubt that there has not been a violation, and there is nothing on which the board can claim that they think there is a violation. In our amended petition before Your Honor we make this statement under oath. I say if Your Honor will require this board to defend their actions, they will have to admit to Your Honor that they know there has been no violation because they have some testimony under oath before the Congressional Committee when they were examined and cross-examined by those hostile Congressmen, they said there has been no violation, and we have had these men watched, and we have reports from the F.B.I., there has been no violation, and by continually hammering at the members of the Board, and continually campaigning in the newspapers against the entire Democratic Administration, they finally changed their policy and issued these warrants, and what do they base it on? Something going back prior to the statement of the Board, of Congress, under oath, that there was no violation. We have not got an ordinary case here, Your Honor. This is an unusual case, and the writ of habeas corpus lies in unusual cases. People don't need to have their liberty taken from them and not have a hearing in court. Of course they say this may all be true, that's what the Government says practically. These gentlemen locally are just following directions from [fol. 130] Washington. I don't say this in criticism, I think they don't know anything about it because the whole policy is dictated from there. But time after time the Government of the United States—they do not deny, and they don't question what I said about misconduct of this board, but just come in and say, oh, you'll get your hearing, but wait for it, wait for it. But I say to Your Honor, this Govern-

ment is not based on that sort of thing, and the very thing we are asking for, this writ of habeas corpus, was established because of star chamber proceedings, because of illegal action on the part of government officials. If we have any liberty we must have a place to go and protect it, and this is the place, and all we are seeking and asking for is a hearing, and we would like to have that hearing somewhere before a fair-minded judge who has neither side to protect and neither side to care for in a political campaign. Just give us a chance to have a hearing and put our evidence in open court, and let somebody be examined and cross examined. In Chicago they stood behind a technical rule of law that members of the Board of Parole were more than a hundred miles from Chicago, and I had no right to subpoena him. They came in and objected to that. All I wanted to do, after the writ was issued there, all I wanted was a hearing on the charges I am making, and they have contested the issuance of the subpoena on that technical ground, and when I finally subpoenaed all the local F. B. I. agents, and had them in Court, the Government stepped up and admitted all the facts. In Chicago they have admitted all the things I am telling Your Honor by a formal demurrer in the court, and are relying on this technical objection, that the court doesn't have jurisdiction.

By the Court: That is admitted for the purpose of the law, but it doesn't mean—it means that you have not set [fol. 131] up a cause of action, even if everything is true, it doesn't mean they are admitting it is absolutely right.

By Mr. Stewart: As a matter of fact, Judge, they are admitting it is true as a fact, because the judge made the announcement when they asked plaintiff for the demurrer, it was the day set for the hearing, and I had the witnesses there, the District Attorney handed up a formal demurrer, and the judge said, "I thought you didn't have the formal pleadings like this in habeas corpus matters," and we straightened out the understanding we had among ourselves, and it's shown in the record for the purpose of that hearing that they admit the facts, and they can't do that without admitting the result, as I see it, and they admit, Your Honor, and they will have to admit here——

By the Court: The only point I make, it is a very different matter to admit the facts for the purpose of a demurrer, and admitting facts on the trial on the merits.

By Mr. Stewart: Well, I am endeavoring to make this argument to Your Honor, here, where you hear a great many habeas corpus petitions, and you have a number of them, and those of us in this branch have seen many of them, and you have seen charges so often made by the prisoner, and the prisoners later on are unable to support it, I mean I sort of anticipate that viewpoint might be taken of a prisoner's petition. I am endeavoring to point out to the court now, because the court has some discretion, that's the thing I am saying about there being just an arbitrary use of power. These things are based on fact, and we have investigated this matter. I feel that I am familiar with it, and I think we can prove this.

By the Court: I still am troubled by the question as to [fol. 132] whether or not the court can pass on any question, any act, as being arbitrary until they have acted.

By Mr. Stewart: Well, that is a good question, and it is answered very easily, I think, because they are acting, the men are in that penitentiary, and they have no business in there. That paper they call a warrant is a commitment, and I refer Your Honor to the Columbia Broadcasting case in the Supreme Court of the United States, and its very recent decision. Your Honor will recognize it when I say that the Court doesn't need to look at labels when you have an administrative procedure, and an administrator has done something, no matter what he called that, you look to see what the effect is. So the effect of this warrant—they call it a warrant, because that's what the Statute calls it—but it is a commitment, it's really a commitment. These prisoners are committed over here, the Board has acted to the extent they have taken away our liberty, and that is a very good question Your Honor asked, and I am glad to have the opportunity to answer it, because that is one of the very important parts in my brief. They have acted. They have taken those prisoners and put them in the penitentiary without any legal right, and they are, have been there since last July, and Your Honor, when we were before the Court in Chicago, it was stated to the Court by the District Attorney, that the writ should not be allowed in any way to interfere with the administrative proceedings, because the Board was down there now, and we don't want to delay the action, and then after the writ was denied in Chicago, why, they brought the men down here and kept them here from

July to September. That is an unreasonable delay. That alone gives Your Honor jurisdiction to look into what they are doing, and we are asking Your Honor only to look into [fol. 133] what they are doing. Of course, if they can come in and show they have a legal warrant issued on reliable evidence, or they think it is reliable, they are allowed a lot of latitude, they are even allowed to be mistaken, but not allowed to proceed arbitrarily, and maliciously, and capriciously, and conspire, they have even gone to the extent of conspiring among them to prevent us having a writ. We set this us in the petition. They knew, they ran into some difficulty with a writ of habeas corpus with reference to DeLucia. He is on bail in Chicago. So the newspapers come out with the claim the thing was not handled right. But in Chicago they took the men out of the jurisdiction without giving them a chance to get a writ, and they did that, they got the warrant, and the warrant shows on its back our marshal in Chicago got the warrant for these prisoners before Your Honor with this petition, got the warrant in his hand and stamped it with his time stamp between ten-thirty and eleven o'clock on the morning of July 22. That's when the marshal had the warrant. All he had to do was to pick up the phone and the men would come to his office. That had been their conduct, they couldn't do anything else, they wanted to, they responded every time they were sent for by them. They were sent for by the Congressional Committee, by the Grand Jury, by various public officials, by the parole officer. Every time they were sent for, it was a matter of minutes for them to get down to the courthouse and answer to anything that was required of them. And the marshal knew that, and everybody connected with this case knew they could have gotten them by phone. But instead of that, they kept the warrant secret, kept it until 5:30 in the morning, went out there with a large crew of people, stormed his home. Charlie Gioe's wife was sick in his home, they would not [fol. 134] allow him to use the phone to make arrangements to take care of his daughter, and dragged him out of bed and dragged him off to a train that left at 7:30 in the morning, before Court was opened. That is conduct for public officials that can't be condoned. If they can do it without a hearing, I don't understand the writ of habeas corpus law, because, you understand, all we want, Your

Honor, is a chance to show these things. Of course, if it reflects on the conduct of people, that's too bad. If they make mistakes in doing these things, it's unfortunate for them, but the men must not be required to stay in the prison and I quote Your Honor a case, when we were talking about whether this case should be petitioned here, or whether or not the court could give us time to hear it, I was told I was in the right court—the Chinese have a proverb, they say, "when you bow, bow low." I understand Your Honor is willing to give a man who has been in prison and is on parole, he is willing to give them a chance, and that's all these men want. And in Fleming versus Tate, I am quoting from the Circuit Court of Appeals, the Circuit Court of Appeals said the way to uphold the parole system and make it work is to have these men believe they are going to get an honest, fair hearing, and the way to break it down and ruin the work it is trying to do is to have them believe they will be dealt with unfairly. These people are being dealt with unfairly, and everybody knows that, including them, and the prisoners. The day has come where we are entitled to a hearing, and that's all we are doing, that's all we are asking for, is a hearing.

I have not touched on one point, and it seems to me it was very clearly answered by Congress. The only difference my friend makes here, he endeavors to point out that the Board had some discretion. Well, they do, with reference to issuing paroles, that is their function, but it is not [fol. 135] for the board to discriminate, and it is our position, and I shall undertake to maintain, if I possibly can do that, the Federal Code here makes it clear that this whole matter is reviewable, and it mentioned the habeas corpus by name, and gives the court the right to look into the matter of these administrative proceedings. I can't sit idly by when I see something being done by public officials who have power and might, but not the law with them, and the facts with them, and so, with reference to supporting our position here, I am quite sure we can do it with reference to the law.

By Mr. Andrews: May I call Your Honor's attention to one thing in connection with this? Going back to the basis on which this warrant was issued, Your Honor knows, has known for a long number of years, Dan Lyon, the pardon attorney in the Department of Justice, one of the

most straight-laced, high minded men who ever served this Government in any capacity. I served with him in the Department of Justice. His brother is —— Lyon. Dan is a very religious person, has practiced law in Baltimore, in Boston. Now, he was chairman of the Board when this Congressional Committee investigated these paroles, and had been appointed Chairman of the Board, as Your Honor knows, Judge Wilson resigned, went down in Mississippi, and resigned. This newspaper sent a reporter down there incidentally to see the judge about this when he was on his death bed, whether anybody paid him any money, that sort of thing, I don't know, inspired by the Chicago Tribune. Mr. Dan Lyon, the chairman of this board, than whom there is no finer living man today, his love for his fellow man, and his efforts to serve his government, and the prisoners, and to rehabilitate them, and to reestablish them, and get something done with this prison system of ours—when he was before the Committee, one of the Con- [fol. 136] gressmen said to him, he had said there was no evidence that this parole could be revoked, "we just haven't got any evidence." This question you understand was to Dan Lyons on testimony before this Congressional Committee. "Mr. Church; If he himself has not concealed it," that is some fraud in getting the parole, "but in acting for him, committed a fraud on your board——" Mr. Lyons answer to the question, "If he committed a fraud. Mr. Church: I am telling you, you are one of those that should have been impeached." Now, it was under that threat from a Congressman, a helpless witness before that Congressional Committee, Dan Lyon, under threat by a Congressman because he paroled these people, and for nothing else, should be impeached. Dan Lyon was testifying, and he testified straight that there was no evidence on which a parole warrant could be issued, and under that threat from this committee, nevertheless, after Mr. Lyon left the Board, another member who was intimidated by this Committee, Mr. Fred Rogers, and he testified throughout—Your Honor knows him, he testified throughout there was no evidence to justify the revocation of this parole. And after this intimidation of Dan Lyon here, the chairman, after the abuse of the parole board by the newspapers, particularly by the Chicago Tribune, Mr. Fred Rogers signed the warrant that is in question right here. They must

have beat him down and intimidated him to where he didn't have any will of his own. Your Honor, this is part of the exhibits in the case. It is the language in small print, but if Your Honor has time to look at it, it would be an astonishing revelation as to what politicians do, how innocent men must suffer. When the Chicago Tribune jumps on this thing, says, "How come them out of jail? Here are some criminals from Chicago, and you have [fol. 137] turned them out. Now what about it?" And they start this horrid investigation, that results in the death of one man and disgrace of another, and the upstart of it is, it winds up by saying, we have not discovered one act of misconduct on the part of the prisoners. The majority of the memorandum on that committee would be very informative reading for Your Honor. They find, maybe these men may have abused their discretion, there has been no wrong done, the system put in there has not been violated, they had excellent institutional records, and nobody claimed they didn't have. They have not, after being released on parole, they have not violated this parole, but along comes the Chicago Tribune, which is opposed to the parole system —just last week I was in Springfield and discovered from there that, the parole board, that the Chicago Tribune is historically opposed to the parole system; that at the time of the trouble here, the Chicago Tribune being opposed to it on principle, and secondly, because of the politics in the thing, all the way through men were asked this kind of thing, "Have you talked to Bob Hannigan about this?" "Have you talked to Gale Sullivan about this?" or "Did you go to see Bob Hannigan?" No more reason to ask this question than I have to ask if you, Your Honor, went to Bob Hannigan, but to intimidate witnesses, and give somebody something to put in the newspapers, that "Andrews says he did not see Hannigan." Your Honor, just building a cornstalk horse for the purpose of knocking him down. Your Honor, all we ask, if we can not establish the issuance of the warrant was arbitrary, and based on nothing except a political crusade, then I'll never put another one in this court. I respectfully ask Your Honor to let these men make bail. They are dragging things along, and have harassed them, and carried them back and forth to Wash- [fol. 138] ington, before Committees, and F. B. I., and everybody else, watched them twenty-four hours a day, un-

able to find anything. The Board not only won't act on their revocation of parole, but it has concealed from us the evidence on which they said they intended to act, and go on, and on, dragging its weary length, while these men are in jail. The Court said in the Hanges case, 222 Federal at 745, the deprivation of their liberty was present, instant, and continuous. Refusal to issue the writ and consider the deprivation of that liberty would be in effect to prolong the period of that deprivation. We get to the point where the period of deprivation is important, if you have a right and can not exercise it, and can get no action on it, then, as Mr. Stewart said, to Your Honor, ought not a court to look into it and see whether or not there is any unusual prolongation of the period of deprivation, or to go further back to inquire into the original warrant?

By the Court: Well, the court of course is ready always to investigate and look into any question which may be raised in the proceedings.

By Mr. Andrews: Yes, sir.

By the Court: The only question in my mind which may be raised in the proceedings——

By Mr. Andrews: Yes, sir——

By the Court: The only questions in my mind are whether or not they are things that can be raised in a habeas corpus proceedings, and the hearing on those particular things certainly would be granted, but whether or not they can be supported is another thing.

By Mr. Andrews: Well, the fundamental, I believe the original concept of habeas corpus——

[fol. 139] By the Court: Most of the things they are asking for I don't see have any place in a habeas corpus proceedings. I mentioned the two that seem to me that might have sufficient merit to justify a hearing on those matters. Now, do you set out in this petition where, you say this original judgment was void, upon what ground was that judgment void? If that judgment is void, of course the whole thing falls, and that may be determined in a habeas corpus proceedings.

By Mr. Andrews: That is on the ground of perjury, because there is no principle——

By the Court: That is the only ground for that basis?

By Mr. Andrews: Yes, sir, for the original conviction. Now, the, I doubt if it could be sustained in a habeas

corpus for some defect in the structure of the indictment itself, unless the indictment is void. Of course the only one is that the conspiracy was formed in Chicago. It is pleaded as being formed in New York. The witnesses testified at the trial, there were several volumes of it, it lasted almost as long as our Chicago trial we had here, which was some five months. The witnesses testified to the identical spot in New York and—in Chicago, and the identical people who formed the original conspiracy in Chicago. Yet the indictment plead, it's a single count indictment, plead it as being in New York. Now, I am very serious about that particular issue, as Mr. Stewart——

By the Court: That issue could be properly heard in a habeas corpus proceedings. Now, I am in doubt about the second, whether or not this court in a habeas corpus proceedings can go into questions of fact with reference to parole violator warrants. It's certainly valid on its [fol. 140] face. Now, how far the court may go into that is a matter I would like to be enlightened on.

By Mr. Andrews: Perhaps Mr. Stewart is better prepared than I am. I want to make this observation. Certainly if I swear out a warrant, go before a magistrate and swear out a warrant for Mr. Beers for stealing an automobile, and describe it by number, that process is regular on its face, but Mr. Beers didn't steal any automobile, and he knows it and stands up in court and says so, which we are now doing, that it is arbitrary and capricious, for some reason Mr. Andrews has gone before a magistrate and charged me with stealing an automobile. Now, Your Honor can go into that in a habeas corpus, in an action that I have charged, without waiting for the Court of Inquiry.

By the Court: What is the response with respect to that?

By Mr. Tysinger: This traverse and brief was just handed me before Court this morning by Mr. Stewart and Mr. Andrews. I have not had the opportunity to see all that it concerned, except in their petition, their original petition and amendment. Now the position of the Government is, the Respondent is, as we set forth briefly from what we could gain in such hurried time from the information that we had, in response, that these petitioners, and the co-defendants, of which there were three, I believe, namely, Roselli, DeLucia, and D'Andrea, and probably another one, Kaufman, were convicted in the Southern

District of New York for violation of the Anti-Racketeering Act in connection with film industries. The case was reported in the Federal Second, on appeal, in the case of the United States versus Compagna, et al, in 146 Federal [fol. 141] Second, 524, and 530. Judge Learned Hand in writing the unanimous opinion of the Circuit Court case on page 526, paragraph 1, says, "as is so often the case in criminal appeals, we are asked to reverse convictions because the testimony on which the verdict was based was incredible. As always, we reply that the question is not for us, but for the jury. In viewing the situation as a whole, if they choose to believe that Bioff, "that Mr. Stewart makes reference to, and Mr. Andrews, has committed perjury, that conclusion is final. Coming to the individuals separately, nothing need be said about Compagna; Bioff connected him with the venture in the most direct way; apparently he was the chief." That is in this long record.

By the Court: That is not the question that is troubling us here, because this court certainly will not go into the merits of the case. The question here is whether or not the conviction was secured on perjured testimony, known to be perjured, by the prosecuting attorney, and used for the purpose of conviction.

By Mr. Tysinger: Of course we deny that emphatically. There was no such knowledge to the prosecution. Of course this has hopped up just since the Supreme Court denied certiorari by these petitions. It was done in the Roselli case in Los Angeles in which the habeas corpus writ was denied the other day. It is now going on in Chicago, before Judge Igoe in which deLucia is appellant, and Mr. Stewart represents him. And now Mr. Compagna's case, in the original case in Chicago, in which Mr. Stewart represented Compagna before Judge Barnes denied writ of habeas corpus. Of course the United States Government prosecution didn't prosecute these defendants in the indictment for violation of this Act of Congress, and this law [fol. 142] of the land, on known perjured testimony. In fact, if it was perjured, it was a jury question, as Judge Hand said, it's the credibility of the witnesses. And of course that is denied as an issue that is raised. We say it is false, just like we deny the presumption in favor of the United States Board of Parole. We are not here to indict the United States Board of Parole, as having indicted them in the words of the petitioner, and in the argument, for

committing a federal offense themselves. They have indicted them for malfeasance in office. They have accused them of acting arbitrarily and capriciously when they presented them with the complaint of violation of the parole, and the evidence, and the record in this case. And here they have those violations of the warrant, first—change—or violation of parole and the warrant which is always part of the record, first, the change of employment without permission. Two, failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth. Three, Association with persons of bad reputation. Four, Failure to conduct himself honorably. Five, Failure to give proper accounting of income and expenditures.

Now, may it please the Court——

By the Court: Were those charges there with reference to actions since the parole was granted, or prior?

By Mr. Tysinger: Since the parole was granted, and it was the basis of the warrant, the basis of the hearing on September 8th before—as the statute provides there, Your Honor read it this morning, the act of Congress, they appeared before the Board, a member thereof, in this case, two members, but that's not the entire board. Now, the entire board, when they get back to Washington, meet, and every member of the Board considers the record, the [fol. 143] whole record, the testimony that the inmate gives, the parolee, or the accused violator of the parole, the accusations brought against him, and all the whole record they obtained, and as the statute says, in its discretion, in their discretion, in the board's discretion, may revoke, modify, or otherwise release. That was the status of this case on September 8th when the board members got to a convenient time, when they finally arrived, after they were incarcerated under the warrant, which the other section of the statute says can take them back into custody, and return them to the institution, and to the attorney general, and the attorney general says, put them back there, that's in their discretion. The courts have held that many times. They get a hearing before the board, and on September 8th, it is true that was in the process of being written up, as I understand it, and probably assimilated in the record, then when the entire three members of the board make a complete, thorough review, and in their discretion under this statutory grant of Congress they modify, revoke, or otherwise release the parolee, and at the insistence of the

Government, as said by Judge Hutcheson, of the Fifth Circuit Court of Appeals speaking for the entire court, this circuit, and which is quoted in all these other cases since that time as being the proper decision of these parolee statutes, Judge Hutcheson said, in Bowers versus Dishong, 103 Fed. 2d, 464, Fifth Circuit, on page 466, said, "that this series of statutes creates a parole," he is talking about these sections of the code, the act of 1930 and 1940, "system applicable to conditional releases as well as other parolees, under which they take their releases and paroles subject to the contingency of being arrested and returned on warrant issued by the Parole Board, or a member, and to the determination by the Board [fol. 144] of whether the terms of the parole or release have been violated. We think that this is not only settled by the terms of the statute, but by uniform course of authority. Many cases might be, the following cases are cited in support of this view." (Reads.) Now, in Fox, a recent case in which Your Honor was affirmed on this very point, in Fox versus Sanford, 123 Fed. 2d, 334, Fifth Circuit, in which Bowers vs. Dishong was cited, and Christianson versus Zerbst, as authority, it was held that whether or not information relied on is sufficient for the parole board to act in the petitioner's case, as to whether or not he violated parole is a matter for the Parole Board since the Parole Board has not taken final action in this case, or entered any final order, as required by law, which is a certificate of revocation, that is always attached to them when they have been given the final order in each parolee. If he is heard by a member, considered by the full board, and the final action is taken, a certificate of revocation is entered, and then the Parole Board has acted. The Board has acted, but the entire proceedings is a matter for determination. It is not a matter, which in Fox versus Sanford in which Your Honor was affirmed, it is not a matter for determination by the court in habeas corpus proceedings. There are discretionary powers as to whether or not they violated, whether these terms of the parole have been violated.

By the Court: I have always put in the reservation there, however, that the action of the Board must not be arbitrary and capricious.

By Mr. Tysinger: That's is true, but here is a board created by Congress, that has the presumption of any other

department or agency of regularity in its favor. They are [fol. 145] indicted only by the inmates of the penitentiary and their attorney as being capricious. They admit in one breath the Congressional record, on account of the Congressional Committee, on account of politics, was investigated and give them a clean slate for having granted a parole. Now, in the other breath they say that they are acting capriciously, arbitrarily, and committing malfeasance by issuing the warrant for violation. I will read Your Honor the fifth accusation, I think they said they had reliable information. The warrant said, which is a matter of record, they did take them into custody under that.

By the Court: I am not going into the question this morning of the truth of the charges, or the merits of the petition.

By Mr. Tysinger: Yes, sir.

By the Court: What there is of the evidence, what I am concerned with is whether or not there are sufficient grounds to justify a hearing on the issuance of the writ, and hearing on the writ. That is the only question I am considering this morning.

By Mr. Tysinger: Well, I am——

By the Court: If the writ issues, those issues appear, of course we will have to take evidence, and the court would then pass on it. But the truth or falsity of the allegations are not questions for determination this morning. For example, if they claim that the original judgment was obtained through perjured testimony, known to be perjured by the prosecuting officer, and they used it with that information before them, whether that be true or false, wouldn't prevent a hearing on the question, I think.

By Mr. Tysinger: That goes to the jurisdiction of the [fol. 146] trial court. That would be a question of dispute, of issue.

By the Court: But what I am more concerned about is the question about this warrant. Now, I looked at it from one standpoint. There they were under the parole order, free and able to go about, do whatever they wished, provided they didn't violate the terms of this parole, and they should not be arrested and taken in custody and confined there if there was not a valid warrant, it seems to me, taking away their liberty without due process. But on the other hand, they are under a certain sentence, ten years, I believe——

By Mr. Tysinger: Yes, sir.

By the Court: That is the judgment which they are really serving, and parole is a matter of grace which is afforded by the federal statute. Now that statute provides that the person who is accused of violating his parole may be taken, where there is reliable information to that effect, and restored to the custody of the attorney general, not under the warrant, that is merely the question of getting possession of him, I should think. But he is put back in the penitentiary under the original sentence, and there he stays until the Board passes on the question as to whether or not he has violated his parole agreement.

By Mr. Tysinger: That's right.

By the Court: Now, that is the technical question that is involved, as to whether or not the court can look into, upon the warrant, as separate from the judgment entered in the original suit, and whether or not that has the same effect as if it were a warrant in connection with the prosecution originally. Have you any authorities along that line? [fol. 147] You see, the United States Commissioner issues a warrant, and a person is brought into court and tried before a jury and convicted. Now that warrant may have been wholly void and invalid, but the conviction would not be, and the court on habeas corpus proceedings would not set aside a conviction because the warrant issued by the United States Commissioner was invalid. Now would the same reasoning apply in the case of the issuance of the parole violator warrant, assuming it is invalid, and the person is brought back and given a trial by the parole board, and the parole board makes a finding. Now will the habeas corpus court, can it go behind the finding and undertake to pass on whether or not the warrant in the first instance was invalid? Those are very interesting questions that——

By Mr. Tysinger: It would be very anal*a*gous to the point about the United States Commissioner issuing a warrant, and suppose it was afterwards found to be void, invalid, but they arrested a man on the warrant, which was apparently under the color of a warrant that they thought was valid, he had a hearing, and was committed to jail, and suppose afterward they found the warrant was void on a hearing. It would be anal*a*gous to that, even if the warrant was void, and they had a hearing before the Parole Board, and the Parole Board finally acted on it. Now, see, they have not acted. It's premature. It has not been acted on yet, because they just had the hearing before the one, or

the two, which is not an entire board, of Parole Board members. In that event the United States Commissioner, of course the warrant would be void, functus officio, it would be like a man coming clear before the jury on the indictment he is indicted on, put in jail.

[fol. 148] By the Court: Yet there is still left the interesting question, though, as to whether or not the warrant, if the warrant were attacked before the conviction, whether or not a person would be released from being held in custody —under custody of that warrant.

By Mr. Tysinger: All right, Your Honor, the warrant says——

By the Court: Here the warrant was issued, and the hearing has been had. Now whether that was a legal hearing is another matter, unless it satisfies the constitutional provisions with respect to having opportunity to be confronted by witnesses, and so forth.

By Mr. Tysinger: Your Honor, this is a statutory proceedings.

By the Court: Whether he was advised of what charges he had against him.

By Mr. Tysinger: The statute, it having been held by the Supreme Court, Your Honor, knowing it to be constitutional, and they say in the discretion of the board——

By the Court: I know, but the Supreme Court never said, as I remember, I don't know of any decision to that effect, I would say—that the Parole Board can have a secret star-chamber hearing and hand down its decision without advising the parolees of the evidence that is brought against him. I don't know of any decision to that effect.

By Mr. Tysinger: There is no proof here they have done such a thing.

By the Court: I know, but I am thinking if they have a hearing that would be on sufficient——

[fol. 149] By Mr. Tysinger: The statute says he shall be given appearance before a member.

By the Court: What?

By Mr. Tysinger: Appearance, to appear in person before a member, or a board.

By the Court: Does it say a hearing?

By Mr. Tysinger: No, it says appear, look at section——

By the Court: Now, the Supreme Court has held that where a defendant is brought before the court upon a charge

of violating his probation, that the court must give him a hearing.

By Mr. Tysinger: Here is the exact language of the statute. He shall be given an opportunity to appear before the said Board of Parole, a member thereof, or an examiner designated by the Board. It said the Board may then, or at any time, "in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof." That is the strict language of the statute, and is interpreted by the court, particularly the Fifth Circuit, and Your Honor has had more than anybody else, other courts, other circuits have held it, it is uniform; and certiorari has been denied, and the Supreme Court has passed on it, that this statute since 1930, the original being back about 1910, with the old Warden, they held that was a discretionary power with the board, since they are serving a sentence imposed by the court having jurisdiction. The only difference, they are serving the unexpired portion of that sentence without the walls of the penitentiary instead of being in. It is a matter of grace, and not a vested right. They awarded [fol. 150] him a first hearing, an appearance, and that's what the statute says. The courts have said that that is in the power of the Board. This Circuit Court, this court, Your Honor has held, and there is no difference in this case and many others. The question is the board will take final action under the statute in its discretion, under warrant, and on the appearance.

By Mr. Stewart: May I hand the court two cases, the Fleming case seems to answer the last question Your Honor asked, and that the warrant is jurisdictional seems to be indicated by Moore versus White, which I hand Your Honor. Both of those questions are considered.

By Mr. Tysinger: There is no dispute here about there not being a warrant. The warrant itself is in the record, and it says, "upon reliable information," and that's what the statute says, except in the new code effective September 1st, 1948, they cut out the "reliable information" out of that, but that doesn't affect this warrant, because they issued it before that. But under the old statute, it says the warrant shall be issued upon "reliable information."

By the Court: Have you cited this case in your brief?

By Mr. Stewart: Yes, Your Honor.

By the Court: Anything else, gentlemen? Anything else you wish to present this morning?

By Mr. Tysinger: No, except in case the writ is issued, the attorneys from the, that represents the United States Board of Parole, chief counsel, Mr. Gottshall, of the Attorney General's office, desires to be present when this writ is issued, and heard. He cannot be present until next week about the 7th or 8th, before then. And I was speaking to [fol. 151] counsel about the time they would like to get a hearing, but this is going to be very technical, and something new, as well as a lot of records, it is going to be voluminous, looks like, if we go into it. I have just been handed a copy of the traverse before court this morning, and the petitioner's brief in the case. I think we ought to have about ten days to be preparing for the hearing, whenever Your Honor—of course Your Honor may just want to read further in the pleadings in order to——

By the Court: Yes, I want to go into matters we have discussed this morning more fully before I issue any order. But since Mr. Stewart is here, I was just seeing about it in the event the writ is granted, what time would be convenient for him, he being a non-resident counsel here, to hear the case on the writ in the event one is issued.

By Mr. Stewart: I can be here at any time that suits the convenience of the court and Judge Tysinger, and the Government attorneys. I am thinking of the importance of the matter, and the fact that these prisoners are locked up, and Your Honor's remarks have been the first indication of even a glimmering hope that we can have a hearing on some very fundamental things, and I would like to have that kind of hearing a prisoner is entitled to, and I know Your Honor would, and Judge Tysinger, and the remainder of the people. Before you give them a hearing on that, couldn't we have a bond? These people are on parole, there is no place they could go, and they don't want to go. They have shown, I mean, they will be here, and we have to prepare for the hearing properly.

By the Court: I wouldn't consider the question of bond until after I have heard the case, something more about it, on the merits, then I will consider that question.

[fol. 152] By Mr. Stewart: Then is there some way that we could have Your Honor, or the Government attorneys, have some member of the board here, I mean——

By the Court: You can subpoena them if they don't, I know if they don't——

By Mr. Stewart: We were blocked on that.

By the Court: You can take the depositions or interrogatories.

By Mr. Stewart: That of course would take time. Suppose we come in, you see, with reference to Judge Tysinger's argument, as I listened to it, I could see how that would be very forcible in the ordinary case, but this is not the ordinary case. May I have just this moment with reference to the charges Judge Tysinger read? You see, we can show in this hearing that Your Honor is going to give us that those things were known to the man who made the warrant, and he, under oath, says he had no evidence. You see, then he goes back of the time when he was under oath and states that he has no reliable information. In other words we could show when we are given an opportunity that he actually had no evidence. Now, with reference to the perjury at the trial, we have evidence in support of that, but it may be necessary to take some depositions on that. In other words, I want to acquaint the court at the earliest opportunity with our situation, if you will grant us a hearing forthwith, even. Could Your Honor do that? Could Your Honor give us a hearing where I can bring the prisoner? I can make a showing sufficient, I believe by them to show that there is nothing here in the way of a violation, and enough to warrant the court in giving us an opportunity to be heard properly, that is with enough time to prepare properly and get our witnesses.

[fol. 153] By the Court: I will give you enough time to present the case. There is no question about that. Let's just see now——

By Mr. Tysinger: I understand it's just a question of setting the date on the question of the——

By the Court: It's not a question, I have not determined whether or not I will issue the writ. If I do issue the writ, then the question is when I will set it down for trial. That's what I am asking counsel now.

By Mr. Stewart: As far as I am concerned, any date, I have, just have in mind what the statute says, that the matters should be summarily——

By the Court: You have just stated you would require a good deal of time yourself to take depositions.

By Mr. Stewart: I might, Your Honor, after we get started.

By Mr. Tysinger: I think we will probably start in and have to have an adjournment and take depositions, and maybe one day, with the first day——

By Mr. Stewart: That's what I am anticipating.

By Mr. Tysinger: I would have, would like to have that be on the 8th, if the Attorney doesn't object to it, the attorney in Washington with me, who is on the parole board, since it is all on the parole board's actions.

By the Court: You mean the 8th of October?

By Mr. Tysinger: Yes, which is next week.

By the Court: I won't have any court room then.

By Mr. Tysinger: We could hold in Your Honor's library. There won't be so many present in the suit.

[fol. 154] By Mr. Stewart: It is agreeable with me if we can get a hearing. We are not going to ask for anything else, you have heard the old adage, the blind man only asks for his sight, we don't ask anything else, but we want a hearing.

By Mr. Tysinger: Of course the Court of Appeals will be here, and I have nineteen or twenty appeals before them and the District Court's new term, before Judge Russell, and Friday is an off-day before the Court of Appeals, and the jury court for Judge Russell beginning the criminal term, and I would like for my benefit, and also Mr. Gottshall's to have it about Friday, the 8th.

By the Court: I don't know that that would be advisable to take this by piecemeal. It seems to me that I will pass on it in the next few days, I will determine whether or not I shall issue the writ, and if I do issue the writ, I think the case ought to go down, be set down at such time that it can be fully heard and completed. I don't want to hear part of it, and then adjourn to another time. I would like to go right through with it when I start. Now, the question is, how long will it take you gentlemen to get ready?

By Mr. Tysinger: The question is, how many issues there are going to be? If they keep raising new ones all the time——

By Mr. Stewart: I don't think there is anything new about this position since we started on this matter. I think we will show you sufficient to entitle us to discharge. We might not be able to meet all the issues suggested here, but we will be able to meet enough to entitle ourselves to

relief. We are ready, and we would like the earliest date [fol. 155] convenient. Of course we must accommodate ourselves to counsel, and we would like to do that, but if we are asked to do that again, I think we ought to have bail.

By Mr. Tysinger: This is, in the event Your Honor issues a writ, does Your Honor want to indicate any future disposal of the case.

By the Court: If I issue the writ, it will certainly involve this first proposition about the use of, alleged use of perjured testimony. I don't see how that could proceed without the taking of depositions and interrogatories?

By Mr. Tysinger: We have to do that in New York, and it will take time.

By the Court: That will take time, but it would have to be later——

By Mr. Tysinger: It would have to be later than that, you couldn't subpoena witnesses in that time in New York to do that. Whatever time the petitioner, Mr. Stewart—the assertion is made, the grounds are made that the court lost jurisdiction in New York on account of there being a conviction on known perjured testimony. The burden rests upon the petitioner to take the depositions. I imagine the Government as respondent can meet the cross deposition at any convenient time in the future that the petitioner, after due notice, that the petitioner can present the direct testimony by the testimony of their witnesses, that they wish to sustain the ground, or grounds made in the petition that the court lost jurisdiction by reason of perjured testimony.

By the Court: How long is the Court of Appeals to be here?

[fol. 156] By Mr. Tysinger: Three weeks, Your Honor, beginning next Monday.

By the Court: How would the 25th of October suit you gentlemen? That is after the Court of Appeals has left, and we would have the court room. Would that give you time to get the depositions and interrogatories?

By Mr. Stewart: I don't want to ask Your Honor to delay the matter for the purpose of taking depositions. I might not even take any. I think if you set it down this afternoon I could show the court enough to show a basis for that particular——

By the Court: I don't think so. The only—I am very doubtful about everything except that one question. Now, as to that one question, I don't see how you can try that

issue without evidence. That is certainly a very serious charge and the court would want the parties to have ample time to support that charge, showing that it is false. I think a charge like that, made in a pleadings, is a very serious question.

By Mr. Stewart: There is no question about it, Judge.

By the Court: And I would want that very fully developed.

By Mr. Stewart: There is no question about it, and we have amply verified it by the exhibits we have filed, the witnesses we charge as having committed the perjury have been guilty of subsequent conduct which indicates the truth of the charges.

By the Court: How could you prove it?

[fol. 157] By Mr. Stewart: Well, you take the entire case of the Government has been switched and changed——

By the Court: I am not talking about the Government now, I am talking about your evidence with respect to the use of perjured testimony. How do you expect to prove that? You say you can do it this afternoon. What proof do you have of that?

By Mr. Stewart: With reference to the false charges of venue, I can prove that by the record of the court itself, and that is here. I believe I can prove that, and that would have been enough that it would show the New York Court didn't have jurisdiction.

By Mr. Tysinger: The whole record was passed on by the Circuit Court of Appeals, Second Circuit, and the Supreme Court denied certiorari on the evidence.

By the Court: That might be persuasive, but it wouldn't be controlling in a habeas corpus case.

By Mr. Stewart: I expect to argue definitely, I took that to the Circuit Court of Appeals, and they didn't decide the point at all, they state it is an objection to the indictment, and that wasn't the point at all.

By the Court: I think, gentlemen, in the event I issue a writ, I will set it for final hearing on October 25th.

By Mr. Stewart: Your Honor give us opportunity to have bail meanwhile? I mean I would be in much better position to try the case if I could have bail? We can give any amount within reason, cash, their own bond.

By Mr. Andrews: I just pointed out to Mr. Stewart, the men own farms and ought to have help to get in crops, it's a

[fol. 158] factor, whether or not they should be out on bail.

By Mr. Stewart: I understand the object of bail is to make sure people will be here, and I don't know how anybody could be more sure of anything than the fact these people would be here because they are anxious to meet the charges and the bail for deLucia in Chicago was ten thousand dollars cash, and we are prepared to put up that for each prisoner here, and that doesn't harm anybody. You see what they have at stake here, if they should lose on this violation of parole, they not only go back with reference to a new, serving the sentence, but they lose that good time they earned while they were waiting for the opportunity to go on parole.

By the Court: I understand that.

By Mr. Stewart: And of course they don't get any credit for the time when they are out, and as a lawyer Your Honor knows that such a person has much more chance to have a fair hearing, if he can have the thing untrammelled by prison regulations, and things. We will be sure to be here. We can give ten thousand dollars cash in each case.

By the Court: Well, I will pass on that—I think I will hear all issues in it on the 25th of October.

(Whereupon the hearing was concluded.)

[fol. 159] Tuesday Morning, September 28th, 1948

By Mr. Stewart: Your Honor, I have a motion for the order for subpoena duces tecum he prepared this morning and petitioner has served notice, and Judge Tysinger is here, and Judge Tysinger is worried a little bit about the cost of producing. I would be glad to answer that, whatever expenses they have, I would be glad to have Mr. Rogers here with his records, I think they would be material.

By the Court: Where are Bioff and Brown?

By Mr. Stewart: With the Department of Justice, they do not disclose their address, they are on probation, and I know this from the tax case, the Department of Justice will not even tell the U. S. Attorneys the address, and that is the situation that arose in the tax court case back in Chicago that was up there, and the only way they can be subpoenaed, the subpoena sent to the Department of Justice, and then if they see fit, they will serve it on the people.

By the Court: What does the Government have to say with respect to that?

By Mr. Tysinger: May it please the court, the application for subpoena for these five witnesses, including one member of the Parole Board, one of the three, Judge Rogers, was served on me late yesterday evening. I have not had any opportunity to see whether these witnesses could be found, and whether they would come voluntarily. Of course in the general accounting office, I spoke to Mr. Stewart about it, they won't subpoena a witness or pay for a witness over a hundred miles. Your Honor knows under the code sec- [fol. 160] tion, under the old rules, this being a civil case, or under the new rules either, one, Your Honor is familiar with the section, 638 of the code, de bene esse, being made for that kind of case, and also the practice, which is the law now, and the rule, under the rule 45 of Civil Rules and Procedure, which specifically says you can't compel a witness to come in civil cases over a hundred miles without the district. Now, there are two exceptions——

By the Court: Now, go ahead——

By Mr. Tysinger: There are two exceptions under the new rules where they can be subpoenaed for the Government over a hundred miles, and that is anti-trust cases and veterans affairs, cases, Your Honor is familiar with the rule 45 of Civil Rules and Procedure, and this section of the code, as to these witnesses. Your Honor remembers we set this case yesterday up to October 25th. Your Honor ruled that we could take depositions, and we said we would cooperate, and I don't know whether these witnesses will come agreeably. However, they may, I don't say. But I just have not had the opportunity to see Judge Rogers, he may be in McNeil Island, Alcatraz, or elsewhere on his official duties, holding parole hearings, to see whether the inmates of those institutions get out, and he is under official duty, and under the law he can't be compelled in a civil case under any circumstances, if he is on official duty, to come over a hundred miles, no more than Your Honor can be compelled to go to New York as a witness. The very law itself, ancient and honorable, the new rules, protect to keep from dragging witnesses and court officials and administrative officials around over the country for every whim and wham of a complainant. Now, as I stated, we are not [fol. 161] taking any obstinate viewpoint of this thing, we are just acting under the law and rules, Your Honor.

By the Court: What is the number of the section with respect to subpoenaing witnesses beyond a hundred miles?

By Mr. Tysinger: The section is rule 45-E, of the new rules. E-1, which says at the request of any party, subpoenas for the attendance at hearings or trials, may be issued by the clerk in the district court for the district in which the hearing or trial is held. (Reads from rule 45.)

Now, the old code section which has been, and there are exceptions, but the old code section, which has always been the rule, I will go to the section later, this is for depositions——

By the Court: I am not talking about depositions, I am talking about requiring personal appearance.

By Mr. Tysinger: In this code section, I believe, it says greater distances, they can be subpoenaed or the testimony of any witnesses may be taken in any civil cause pending in the district court by deposition, de benes esse, when the witnesses live—(reads from code section.) That is the section that has been the code. Now, there are two exceptions. I will show these to Your Honor, Your Honor might like to see the notes under rule 45.

By the Court: Just read the pertinent part, what you want to read.

By the Court: Rule 45-E. At the request of any party——

[fol. 162] By the Court: May I ask Mr. Stewart, what section are you relying on?

By Mr. Stewart: Your Honor, if my understanding is correct, the writ of habeas corpus comes from common law, and it is not governed by those rules, but just to play safe I read in the rule that for cause shown the judge may order a witness a longer distance, so I am coming in with a petition to show cause——

By the Court: Let me see the section you are relying on.

By Mr. Stewart: If I am correct, Your Honor, we don't need to pay any attention to these rules at all in habeas corpus matters.

By the Court: Well, there is a statute which provides for that, regardless of the new rules.

By Mr. Stewart: And this new rule provides that the witnesses may be subpoenaed in the district and within a hundred miles, and when it is a statute of the United States to provide therefor, the court upon proper application and

cause shown, may authorize the services of a subpoena at any other place.

By the Court: Now what law provides it in your case? That's what I am trying to get here.

By Mr. Stewart: Well, for one thing, the administrative code under section C with reference to evidence, provides that each party shall have the right of reasonable cross examination and submit rebuttal evidence. Section D on it with reference to the record provides that upon the payment of lawfully prescribed costs, the record should be made available to the parties.

[fol. 163] By the Court: That has nothing to do with personal appearance of witnesses.

By Mr. Stewart: No, but after I left yesterday, it occurred to me yesterday, Your Honor, I have had correspondence with the members of the Board, and they have written me specifically they are not going to give me that record, and if I want to take their deposition, they would refuse to give it to me, or refuse to allow me to look at it.

By the Court: Then you can——

By Mr. Stewart: Then I have to come back and report that to the court.

By the Court: Isn't there a provision which would permit you to submit the matter to the court in that jurisdiction, as contempt of court, if they didn't obey it?

By Mr. Stewart: I would have to have some sort of process from this court first.

By the Court: Yes, you would have to serve notice about taking depositions and service, that is all.

By Mr. Stewart: Well, Your Honor has a great deal of discretion in this matter, and I am just appealing for that. You set the case for hearing October 25th, and that is long enough time away for them to arrange their affairs. I am only asking for one member of the board, that is the man who issued the warrant.

By the Court: I placed it that far in advance to allow you to take depositions.

By Mr. Stewart: Depositions are not always satisfactory, Your Honor.

By the Court: I think they will be in this case. I don't [fol. 164] think it is proper to require the president or the officers of the government to travel great distances when a deposition might answer the purpose.

By Mr. Stewart: Will Your Honor order them to produce

the records, or deliver the records to the district attorney so it will be within the jurisdiction of the court?

By Mr. Tysinger: Your Honor, the Attorney General of the United States expects to do whatever they interpret the law, and all the rulings, to be, as correct in the matter, and that is the position we take. In depositions or otherwise. We will reach that question when we get to it.

By the Court: I think the proper procedure would be for you to take the depositions of the parties at distant places, and request subpoenas duces tecum to be presented at that hearing, I mean for the production of papers, and things, at that hearing.

By Mr. Stewart: I would like in some way to get some expression from the court as to whether or not I am entitled to that record. Now, if I read this administrative code properly, and the law properly, I am entitled to it, and I would have to have an order of the court.

By the Court: Well, that is a matter that the court wouldn't pass on without hearing the parties, because the statute with respect to the Parole Board is a peculiar statute, and it is not one that just comes under the general administrative rules. Well, I will deny this application, and if the question arises later on, they will be met as they are presented. Of course the motion is denied without prejudice to take depositions or interrogatories in accordance with the provisions of law.

By Mr. Stewart: I understand that, and I can't afford to [fol. 165] just stand on any record, I am going to make every effort to get the evidence.

By the Court: All right.

By Mr. Stewart: I noticed Your Honor was looking at a typewritten copy of the petition yesterday. May I supply you with a printed one, please?

By the Court: Yes. I believe you have submitted a brief already.

By Mr. Stewart: Yes, Your Honor.

By Mr. Tysinger: May I reply to the comparable briefs of the co-defendants, Your Honor, the co-defendants, the same before other courts, made in this case.

By the Court: Yes, you may submit it as a memorandum to be used in this case.

By Mr. Tysinger: They are the same issues, just another co-defendant with the same habeas corpus.

By the Court: I believe that is what was done by the petitioner, they submitted a brief that was prepared in another case for brief in this case.

By Mr. Stewart: That's right.

By Mr. Tysinger: I thought I could have the same privilege.

By the Court: Yes, you have.

By Mr. Mundy: Counsel has brought up this question, Your Honor of course said that would not be prejudicial to the right to proceed by deposition.

By the Court: Just put in there, does not prejudice the [fol. 166] right to take depositions or interrogatories. I think that is the legal effect anyhow.

By Mr. Mundy: Yes, sir. That is the reason I didn't put it in, Your Honor.

By the Court: If he wants it in, put it in.

By Mr. Mundy: Your Honor, there was a prepared order on the last sheet, I think the clerk should delete that, that is not used.

By the Court: You can just tear it out.

(Whereupon the hearing was concluded.)

Filed Oct. 6, 1948.

[fol. 167] In the District Court of the United States for the Northern District of Georgia, Atlanta Division

H. C. 2329

Louis Compagna

vs.

W. H. Hiatt, Warden, U. S. Penitentiary, Atlanta, Georgia

H. C. 2330

Charles Gioe,

vs.

W. H. Hiatt, Warden, U. S. Penitentiary, Atlanta, Georgia

Before Honorable E. Marvin Underwood, Judge

October 25, 1948

Reporter's Transcript of Hearing

Appearances

For the Petitioners: Wm. S. Stewart, Esq., Chicago, Ill.; M. Neil Andrews, Esq., Atlanta, Georgia.

For the Respondent: H. H. Tysinger, Asst. U. S. Attorney, Atlanta, Georgia; A. E. Gottshall, Department of Justice, Washington, D. C.

[fol. 168] Monday Morning, October 25, 1948

(Court was opened at 10 o'clock, and the following proceedings were had.)

By the Court: Compagna against Hiatt, and Gioe against Hiatt. I understand they are to be tried together.

By Mr. Stewart: We would like to try them together. There are some matters that apply to the particular case, but I think Your Honor will be able to distinguish them as we go along.

By the Court: The Government has no objection?

By Mr. Tysinger: The Government has no objection.

By the Court: You may proceed.

By Mr. Tysinger: I want to offer an amendment to the response. I have served counsel a sort of amendment to the response. May it please the court, at this time——

By the Court: Any objection to this amendment, gentlemen?

By Mr. Stewart: I don't see any objection, Your Honor. May our pleadings just stand as we, as if we filed them over again?

By the Court: Beg pardon?

By Mr. Stewart: May our pleadings stand to this the same as they now stand for the present pleadings?

By the Court: Yes.

(Following the above proceedings oral testimony was [fol. 169] given by Louis Compagna and Charles Gioe and Mrs. Louis Compagna.)

Charles Gioe, being duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

Q. Will you state your name please?

A. Charles Gioe.

Q. What is your residence address?

A. 200 E. Chestnut Street, Chicago, Illinois.

Q. And you are now confined in the Atlanta Penitentiary, are you?

A. Yes, sir.

Q. And you are one of the petitioners here on this writ of habeas corpus?

A. Yes, sir.

Q. Now, directing your attention first to the matter of your parole, did you make application for a parole?

A. Yes, sir.

Q. And was that parole granted to you?

A. Yes, sir.

Q. And did you accept parole?

A. Yes, sir.

Q. And enter upon parole in Chicago?

A. Yes, sir.

Q. At the time that you were entered upon parole, were [fol. 170] you given instructions, including some written papers and rules with reference to your conduct while on parole?

A. Yes, sir.

Q. Did you examine those papers?

A. Yes, sir.

Q. Who was the immediate official connected with the parole supervision, who had to do with your case?

A. Mr. Hladis.

Q. And where is his office?

A. Chicago, Illinois.

Q. And what is his position?

A. Probation officer.

Q. And did you discuss the matter of your living on parole with him from time to time?

A. Yes, sir.

Q. How long were you on parole?

A. Approximately eleven months.

Q. And during that time where did you live, and with whom?

A. With my family at 200 East Chestnut Street.

Q. Was that in compliance with your understanding and agreement with your parole officials?

A. Yes, sir.

Q. And did you have employment?

[fol. 171] A. Yes.

Q. What was your employment?

A. I worked with the Consolidated Wire Associated Companies.

Q. And where is this place of employment?

A. 1634 South Clinton Street, Chicago, Illinois.

Q. What is their business?

A. They are in the wire, sign, camera, optical and plastic business.

Q. And that is a concern which has been established in Chicago for some time?

A. Thirty-five years or better.

Q. A reputable company?

A. Yes, sir.

Q. And was your employment by this company approved by your parole officials?

A. Yes, sir.

Q. Now, during the time you were on parole, I will ask you in a general way, did you comply with the written rules and regulations made by your parole agreement?

A. I done nothing without the approval of the local parole board.

Q. And did you, during that time, live as a law abiding citizen?

A. Yes, sir.

Q. And did you live according to the regulations that you, as you were given to understand they were?

[fol. 172] A. Yes, sir.

Q. Since your parole, were you taken back to the penitentiary?

A. Yes, sir.

Q. On what date was that?

A. August—July 23rd or 4th, I believe.

Q. You are giving us the date you reached the penitentiary, are you?

A. Yes, sir.

Q. Where were you when you were taken in custody?

A. At home.

Q. At what time were *were* you taken in custody?

A. About 5 or 5:30 in the morning.

Q. And by whom?

A. Well, there was two marshals, a city policeman, and two other gentlemen there, I don't know what their capacities were.

Q. And where were you taken when you were placed under arrest?

A. To the Federal Building.

Q. About what time did you reach the Federal Building?

A. Oh, I would say about twenty minutes after I was arrested, 6 or 6:30.

Q. Then where were you taken?

A. Well, I was kept in the lockup there, and taken through [fol. 173] the back elevator down to the basement, and put into a car and taken to the depot, and put on the train.

Q. And what time did that train leave Chicago?

A. I would say some time after 7. 7:30 or so.

Q. Are you speaking of the same morning you were arrested?

A. Yes, sir.

Q. Where was your family at the time you were arrested?

A. My wife was in the hospital, and my daughter was home.

Q. And just very briefly, was there anything said to you about, or any request made by you, for permission to communicate with your attorney, or anybody?

A. I made an attempt to get in touch with my attorney. I was denied that.

Q. And from the time you were arrested and taken from your home until the time you were put on the train and left the city of Chicago, were you permitted to communicate with anyone outside of these public officials?

A. No, sir.

Q. At the time you were arrested were you shown a warrant?

A. I was. They read off what purported to be the warrant.

Q. And in a general way, was that warrant in the form that you have attached to your petition as an exhibit, which states in a general way the fact that you had been [fol. 174] convicted in New York, and that reliable information had been presented to the member of the Board, and, that you had violated your parole, is that it?

A. I did not read the warrant. I just heard it read.

Q. As far as you heard it read, did it in a general way comply with the form attached to your petition?

A. Yes, sir.

Q. And at that time were you given any further information as to the nature of the charge which was made, or to be made against you with reference to this violation?

A. No.

Q. Did you request that this charge be specified?

A. Yes, sir.

Q. And of whom did you make that request?

A. You mean at the parole board hearing?

Q. Well, I am just leaving it open for you to answer.

A. Oh, well, you suggested that you had worked on that before, but also to the parole board.

Q. And did you finally learn that they had what they would call a referral which specified the charges?

A. That was much later.

Q. Yes. About how long had you been in the penitentiary when you first learned of the existence of that paper?

A. Five or six weeks.

Q. And in a general way that referral is set up in your petition, is it not?

[fol. 175] A. Yes, sir.

Q. I am going to call your attention to the charges as they exist in that referral so that you can tell the court the facts with reference to those charges. Number 1, change of employment without permission. Did you, during the time you were on parole, change employment without permission?

A. No, sir.

Q. Is it a fact that during the time you were on parole you took up the matter of your employment, even the matter as to the details concerning what you were doing?

A. Yes, sir.

Q. From time to time with your parole officials?

A. Yes, sir.

Q. And through those conferences did he know every day what you were doing?

A. Yes, sir.

Q. And did he know where you were?

A. Yes, sir.

Q. And all during that time did you do anything that he would object to in any way, with reference to your employment?

A. No, sir.

By the Court:

Q. During that period, did you, as a matter of fact, change employment?

A. No, sir.

[fol. 176] By Mr. Stewart: I may come back to that, Your Honor, but I wish to go formally through this first, and if there are any further details, we may develop that later.

By Mr. Tysinger: Your Honor, for the sake of the record, we want to make objections here and now to entering into this matter within the jurisdiction of the parole board. It is a matter irrelevant in a habeas corpus proceedings.

By the Court: Overruled.

By Mr. Stewart:

Q. I'll read number 2 to you, concerning this referral. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth. Is there any basis for such charge?

A. No, sir.

Q. Will you tell the judge about the date that you left the penitentiary in Leavenworth, Kansas to commence your parole?

A. We left the penitentiary, and took a bus and went to the bus station in Leavenworth, that, the penitentiary is some miles out of the town of Leavenworth, at the station we met this Mr. Bernstein, whom I had never met before.

Q. You have learned his occupation since, haven't you?

A. Yes, sir.

Q. And what is that?

A. He is an attorney at law, and he represented Mr. Compagna and DeLucia in a tax case.

Q. About what date are you talking?

[fol. 177] A. August 13, 1947.

Q. Go on and relate to the judge what happened.

A. Well, he was there——

Q. You are talking about Bernstein?

A. Bernstein was there, and he had a car with some man driving, he drove us to the airport, and we got to the airport, waited for our plane, and went to Chicago. At the airport my family was there, my wife picked me up and I went home.

Q. Now, will you tell the judge the persons who were with you outside of those you have mentioned, if there were any, at the particular time of that airplane flight.

A. There was no other persons with us on the airplane flight outside of Mr. Compagna and Mr. DeLucia and Mr. Bernstein.

Q. Were there other passengers on the plane, part of the traveling public?

A. Yes, sir.

Q. Any of those passengers known to you?

A. No.

Q. Did you recognize any of them?

A. No.

Q. Know any of them?

A. No, sir.

Q. Before you took the plane did you discuss the matter with anybody connected with the institution you were just leaving?

[fol. 178] A. I had no idea we were going to take a plane, I didn't know we were going to take a plane at all.

Q. And did you have anything to do with buying the tickets?

A. No, sir.

Q. When were you first asked by any one connected with the Government concerning this airplane flight?

A. I was asked at the grand jury in Chicago.

Q. Now can you give us the approximate time?

A. I can't, oh, some months after we had been home.

Q. And I take it you were asked by the district attorney when you appeared as a witness before the grand jury?

A. Yes, sir.

Q. And at that time were your answers truthful?

A. Yes, sir.

Q. And since then have you been asked about that by any one connected with the Government?

A. The parole board.

Q. And when was that?

A. September 8, 1948.

Q. While you were in the Atlanta Penitentiary?

A. Yes, sir.

Q. And——

[fol. 179] By the Court:

Q. What date?

A. September 8th.

By Mr. Stewart:

Q. And when you speak of the parole board, please designate who the persons were.

A. Doctor Killinger and Judge Moscowitz.

Q. And who else was present, if any one?

A. Two reporters, Mr. Goodwin of the Institution.

Q. And were you asked questions concerning this airplane flight at that time?

A. Yes, they asked me about it.

Q. And did you tell them the facts substantially?

A. I told the same story, that was the truth.

Q. Now, going back to number one, where you are charged with change of employment without permission, were you asked about that by Doctor Killinger and Judge Moscowitz in your hearing of September 8th?

A. Yes, sir.

Q. And did you give them truthful answers?

A. Yes, sir.

Q. Substantially the same as you are giving the judge here?

A. Well, they went in detail there, and it summed itself up in that particular thing on my parole application, the job designated was salesman, but in view of all the publicity [fol. 180] I had received, the, my employer took and put me in the office, and he tried to make something out of that, that it was a change of jobs from outside work to inside work, from what I gathered.

Q. Did you explain the reason for making the change?

A. Yes, sir.

Q. And did you explain that had been discussed with your local parole supervisor?

A. Yes, sir.

Q. And did you explain that you had the consent of that local parole supervisor before you did anything in the matter?

A. The local parole supervisor told me anything my employer asked me to do, I was bound to do, I was in his employ.

Q. Now——

By the Court:

Q. Had the employment been secured by the probation officer at your release?

A. Yes, sir.

Q. He got the position, and you didn't get it yourself?

A. Oh, no, the job, Your Honor, my form, when I make it out for the parole form, I put down I could obtain a position with this company.

By Mr. Stewart:

Q. As a matter of fact was there any one in that company previously known to you?

[fol. 181] A. Well, just one of the officers, and two of the officers I knew from when I had my restaurant, they had been customers there, and I gave them.

Q. And had the matter of your employment been dicussed by some one on the outside in your behalf before you were released?

A. I believe so.

Q. Now, referring to number 3 in these charges, association with persons of bad reputation. From the time

you were released on parole until you were returned to the Atlanta Penitentiary on this violation warrant, did you associate with any persons of bad reputation?

A. Not knowingly.

Q. And were you——

By Mr. Tysinger: If Your Honor please, I wish to renew my objection to that as the same as the first two, it is in the province of the parole board, they had jurisdiction, and it's irrelevant, and they had not decided it as yet. There is a case upon that. I wish to make the objection for the sake of the record.

By the Court: Overruled.

Q. With reference to this charge which I have just read, being number three, when was it first called to your attention that you were charged with any such matter?

A. Which reference is that?

(Reporter was requested to read the last question.)

Q. When was the paragraph 3 here first called to your [fol. 182] attention as being a charge made against you? When did you first learn that was one of the charges?

A. In the penitentiary, on the referral, I don't know if I got it in your brief, I don't ever remember getting any correspondence from the parole board telling me I was charged with it.

Q. And during the time you were out on parole that charge was not made against you, was it?

A. No, sir.

Q. And when you were brought before these two members of the parole board, what questions were asked concerning that matter, as you remember them?

A. It seems as the, my employer bought an interest in a new company, in the plastic division, and they asked me to go down there with the auditor and take a fiscal inventory, and I done what I was asked to do, you know, do that, and he asked me if it was possible for me to take some managerial capacity with this new company he had bought an interest in, and I told him I would ask the parole board, and I took and got the certified public accountant's statement, took a list of the stockholders and presented them to the board, to the Chicago board, they in turn——

Q. Tell us the name of the person you talked to in Chicago concerning this matter.

A. Mr. Hladis and Mr. Fisher both.

Q. Who is Mr. Fisher in Chicago?

A. He is the head probation officer.

Q. And you have already identified Mr. Hladis, he is the probation officer in charge of your case?

[fol. 183] A. Yes, sir.

Q. And you discussed the matter with them?

A. Yes, sir.

Q. And just tell the judge briefly of that discussion.

A. Well, he told me he would take it up with Washington.

Q. And did you ever get any answer back?

A. No, sir.

Q. And was anything further done with that proposed

A. I told them, I asked if it was all right for me to continue in that capacity until he heard from the board, and he and Mr. Fisher both said "yes".

Q. So not having heard from anybody, you didn't go ahead with the matter that was proposed, is that right?

A. No, I just held everything in abeyance, I waited for them to tell me if I could take over a position with that company.

Q. And what was the nature of that company, what business had they proposed to go into?

A. They were in business, they were manufacturing the plastic articles and dyes and molds, machinery.

Q. In discussing it with your parole officials in Chicago, did you acquaint them with the persons who were interested in this proposed new venture?

A. I gave them the list of stockholders.

Q. And from the questions that were asked you in the [fol. 184] parole board hearing, are you able to say what persons among those were under question or investigation?

A. There is one that they called my attention to. That was a minor stockholder and not active in the company.

Q. What is his name?

A. Sam Macy.

Q. And what about him?

A. He, seemed like in 1918 he done a year in the workhouse.

Q. And had you associated with him during the discussion of this new proposition?

A. I never saw him.

Q. And from the time you left the prison on parole until the time you were returned for violation, you had not even seen him?

A. Not Sam Macy.

Q. And is he the only person in that list?

A. His brother, Phillip Macy, was secretary and treasurer of the company.

Q. And was there any question raised as to his citizenship?

A. Yes, it seemed he had a number of arrests.

Q. And during the negotiations in the matter of a proposed venture, had you associated with this brother?

A. No, sir.

Q. Had you seen him?

[fol. 185] A. Yes, sir.

Q. And when you did see him, were you in the company of other people?

A. Yes, sir.

Q. Who?

A. Well, different times, different people. I was in the company of Mr. Stacy, Mr. Mann, the two Manns of the company I worked for when we went over and discussed this proposition over at the plastic company.

Q. Was that the extent of your business with these people?

A. That is all.

Q. Was that the only matter you discussed?

A. Yes, sir.

Q. And the only contact with the people under discussion was in this way, is that it?

A. Just in this plastic company.

Q. Was this information all given to your local parole officials as it progressed?

A. I gave them the total list of the stockholders, and the officers of the company so that they could examine or investigate them before I made a move to try to get in with the company.

Q. Now, calling your attention to number 4, I will read it to you. "Failure to conduct himself honorably." Is it a fact that while you were on parole that you failed to conduct yourself honorably in any way?

A. No, sir.

[fol. 186] By Mr. Tysinger: May it please the court, may I have the same objection to that?

By the Court: Yes. Same ruling.

Q. At the time you were examined by the parole board members in the penitentiary in Atlanta, were you asked any questions to indicate any further particulars concerning the general charge, "failure to conduct himself honorably"?

A. No, sir.

Q. Number 5. I will read it to you. "Failure to give a proper accounting of income and expenditure." Is it a fact that you failed to give a proper account of your income and expenditures while you were on parole?

A. No, sir.

Q. From the questions that were asked you by the parole board members on September 8th, can you give the judge any more details as to the possible nature of that charge?

A. On the parole form that you fill out, there is one side for your income, and one side for your expenditures. It seems like one month my income was three hundred dollars, I had spent five hundred twenty-five dollars. He questioned me on that. I explained to him, I believe it was Christmas month, and I spent two hundred twenty-five dollars more than my income for presents, and I write it down as expenditures, and he asked me why I didn't put it down where I got the money, and I told him I went to the bank and got it, and that was all about that. Also he asked me——

[fol. 187] By the Court:

Q. You mean you borrowed it from the bank?

A. No, I have a bank account. It was my own money, I had not earned it, and I just marked it down for fulfilling the expenditure side, and also asked me some months that I would receive three hundred seventy-five dollars, and some months I would receive three hundred. I explained to them that some months there were five pay days, and that was all.

By the Court:

Q. What was it?

A. Five pay days in the month, and that was all there was about the expenses.

By Mr. Stewart:

Q. Now, had these matters concerning your expenditures as you reported them to your local parole officials, had those matters been discussed previously with your parole officials?

A. When I first went to see my parole officer he told me it was not necessary to put down the expenditures. So I complied with that, and just put down what I earned. After the Congressional investigation, it was some six or seven months later, they called me up there, but they never put me on the stand, that is the Congressional Committee, and on the return trip they put me on the stand, and following that the parole officer called me and sent me back all my reports and asked me to fill them to the best of my knowledge, as to the expenditures from the beginning of my parole.

[fol. 188] Q. And did you make those alterations at his request?

A. Yes, sir.

Q. And the first ones that were turned in, was he acquainted with your situation and had you discussed where you were living and working?

A. Yes, sir.

Q. And had he approved of your method of accounting?

A. Yes, sir.

Q. During the time you were living in Chicago, and working at the place you have mentioned, is it a fact that a number of times you were required to appear before the various bodies, for instance, the grand jury, and the Congressional Committee, and go down and see your parole officials?

A. Yes, sir.

Q. How did those requests come to you? By telephone?

A. Well, the F.B.I. came by telephone, and in person. The grand jury came by subpoena. The Congressional Committee came by subpoena, and the parole officer would call me up.

Q. Well, when you say the Congressional request came by subpoena, it is a fact, isn't it, that you went down to your parole officials first, so that they could serve the subpoena on you?

A. Yes, sir.

Q. So the original request came by telephone, did it not?

[fol. 189] A. Yes, sir.

Q. And that was your practice while you were on parole. Any time your parole officials would telephone you, you would go down right away, is that right?

A. Yes, sir. There was no need for subpoena, I would go.

Q. You responded each time to the telephone call?

A. Yes, sir.

Q. And how far was this in distance from your home, and your place of business, from the Federal Building where the parole people were meeting.

A. Ten or fifteen minutes at the most.

Q. Before September 8th, did you have a discussion with me and some correspondence concerning the rights that you were advised you had, and which you wished to have at the parole hearing?

A. Yes, sir.

Q. And you are acquainted now with the fact that I had written a letter to the parole board?

A. Yes, sir.

Q. And I gave you a copy of that letter, did I not?

A. Yes, sir.

Q. And at the time that the parole board met, acting under any instructions, did you make the same request of them?

A. Yes, sir.

[fol. 190] By Mr. Stewart: And that letter will be in evidence later, Your Honor.

Q. In a general way you asked for the right of counsel at this hearing and the right to have witnesses brought there on your behalf in the various matters that are set up in the letter?

A. Yes, sir.

Q. But those rights were denied you, is that right?

A. Yes, sir.

Q. And the hearing you have described here consisted of some questions asked by the members of the board and that is all?

A. Yes, sir.

Q. And have you told the court in a general way the substance of those questions? I mean have we covered

the subject now that they discussed with you when they were questioning you at that hearing?

A. Well, he, there was one thing he spoke of, about, was a letter I wrote on the advice of my parole officer in Chicago to the board, stating in there I would like the opportunity to take, and take a financial interest in this plastic company, providing they approved it, and that I knew one of the gentlemen for a long time, or mentioned something in there I had known him for a great number of years, and which we considered a life-long friend.

Q. Who was that you were referring to?

A. Phil Macy.

Q. And you had, had you——

[fol. 191] A. And he seemed to make much of that letter because he were a life-long friend of mine, and I said, I have not seen him in ten years, or thereabouts, but I have known him since we were youngsters, I didn't know anything about the man being in trouble, I didn't know anything about a conviction, or anything like that.

Q. What was his business, as you understood it to be?

A. He was in the plastic and machinery business.

Q. When did you learn he had previously had some difficulty with the law back some years ago?

A. I had not seen him in ten years.

Q. When did you first learn there was such a blemish, if you might call it, on his record?

A. When I submitted the stockholders to the local board in Chicago.

Q. And did they inform you then that that man had some trouble with the law?

A. Yes, sir.

Q. And after that information was given you, did you have any business dealings with that man?

A. No, sir, I just, let me——

Q. Go ahead and explain.

A. He said he would write, I asked if it was all right to continue looking forward to going with that company, I wanted to give it up, and he said, don't do that, I will write to Washington, and I will see if they will give us approval for it, and in the meantime, he says, you can stay there and do whatever you have to do in

[fol. 192] the interest of your own company, that you are employed for.

Q. And when you say "he", you are referring to Mr. Hladis?

A. Mr. Hladis and Mr. Fisher.

Q. I see. And was there a connection between the company you were working for and the people in that company, and this proposed new venture?

A. No, sir.

Q. And was your employer interested, or to be interested in the new venture?

A. Oh, he had bought interest in there.

Q. I see.

A. He had interest in the company.

Q. Is that the way the matter was first called to your attention, by your employer, or from some one outside of your——

A. I believe it was that they needed money.

By the Court:

Q. What?

A. They needed money, and they came to us with the proposition of selling some of the stock for some more money, so they could expand.

By Mr. Stewart:

Q. When you say "us", it included, who is that besides yourself?

[fol. 193] A. The Consolidated Wire officials.

Q. And would an undertaking such as that come in their general line of business?

A. Yes, sir.

Q. That is they were on the lookout for any new ventures that were along the lines of the business they were in?

A. Yes, sir.

Q. That is, you have just mentioned in passing, but I want to call your Honor's attention particularly to it, you were present because of a subpoena in Chicago when the Congressional Committee met there?

A. Yes, sir.

Q. That is true?

A. Yes, sir.

Q. But they didn't ask you any questions at the first hearing, you were there?

A. I was there two days, and they never called me.

Q. Then when they met again——

By the Court:

Q. Were you on parole at that time?

A. Yes, sir.

By Mr. Stewart:

Q. And when they met again, isn't it a fact that the chairman said, well, there may be some criticism for not calling you, so they were going to call you?

[fol. 194] A. He mentioned that.

Q. And you were asked some questions, were you not?

A. Yes, sir.

Q. And did you answer them truthfully?

A. Yes, sir.

Q. And you have seen, haven't you, a printed report of those hearings, which includes a transcript of your testimony?

A. Some of it I have not seen the testimony of, Mr. Scott.

Q. This brown volume, wasn't that delivered to you in the penitentiary?

A. No, sir.

By Mr. Stewart: I left it with the Warden, I was hoping they would give it over before the hearing, but we will have an opportunity to look at it. All I wanted to ask him, if that was substantially correct reporting as to his answers.

By the Court: When he goes off the stand he may look at it.

By Mr. Stewart: Yes, sir.

By the Court: You may have an opportunity to put him back on the stand after he has a chance to look at it.

By Mr. Stewart: Thank you, Your Honor.

Q. I was just reminded by looking at the report of [fol. 195] the hearing, you were asked a number of questions concerning your application for parole, isn't that true?

A. Yes, sir.

Q. Who your sponsors were, who recommended you for parole?

A. Yes, sir.

Q. In a general way I want to ask you, that application was made in regular form under the supervision of the officials, was it not?

A. Yes, sir.

Q. There was nothing wrong about it?

A. No, sir.

Q. Nothing illegal:

A. No, sir.

Q. No fraud committed on your part?

A. No.

Q. No deceit practiced by you?

A. No, sir.

Q. And it was all done in good faith by you?

A. Yes, sir.

Q. Now at the time you were originally tried on this offense, where were you living?

A. Chicago, Illinois.

Q. Chicago, Illinois?

A. Chicago, Illinois?

[fol. 196] Q. At the same address you have given us?

A. Yes, sir.

Q. And had you prior to that time ever been in New York in conjunction with any of the business of Bioff and Brown?

A. No, sir.

Q. And had you had any connection with them, no matter what they may have done in New York?

A. No, sir.

Q. And you were tried in New York, were you not?

A. Yes, sir.

Q. And in a general way we will probably, we will have the record here, but the charges were that you had conspired in New York with Bioff and Brown, and others, isn't that true? That is the charge?

A. Yes, sir.

Q. Is that true or not?

A. No, sir.

Q. You mean the charge is false?

A. Yes, sir.

Q. And did you conspire with Bioff and Brown in any way?

A. No, sir.

Q. And there was a considerable amount of money mentioned by Bioff and Brown in their testimony in New York, was there not?

[fol. 197] A. Yes, sir.

Q. And in a general way they testified to having obtained that money illegally from some moving picture magnate, that's true, isn't it?

A. Yes, sir.

By Mr. Tysinger: If the Court please, I wish to object to this part of it from the previous trial, since this petitioner and the co-defendants were tried in the Southern District of New York, and convicted, appealed to the Sixth Circuit, and confirmed, and certiorari was denied by the Supreme Court of the United States on the very question counsel is asking now concerning the conspiracy. He asked him questions previous to trial——

By the Court: Are you attacking the original judgment?

By Mr. Stewart: Yes, Your Honor, and I assume from Judge Tysinger's attitude and objections, he will have considerable legal argument to make, and I would like to be heard on it, and could we argue it at the time when we argue the matter? This is very short and I am about through with the questions. I want to ask one more question, and it is preliminary to another charge that has been made here in these parole matters concerning the money, and it will go more directly to Mr. Compagna's case, but I wish to show by Mr. Gioe that he received none of that money, and the Government has not made any income tax claims against him. I just want to clear that up.

By the Court: Are you asking this court in a habeas corpus proceeding to try the issue of the fact as to whether [fol. 198] or not they actually conspired in New York, when that was an issue before the court to determine in that case?

By Mr. Stewart: Well, I am asking this court to examine into the charges in this petition, that the indictment in New York alleged the formation of a conspiracy in New York, and that——

By the Court: The indictment was good, was it not?

By Mr. Stewart: No, it wasn't.

By the Court: I mean technically, formally, if the facts set out in the indictment were true, it is sufficient for conviction?

By Mr. Stewart: I think I am completely barred on that. That's what the Circuit Court of Appeals said to me in answer to my objection, but they didn't answer my objection. I think I can clear that up, Your Honor, at the time we argue the matter. I won't take up much time on the testimony because we have some more in depositions. I merely wish to show by Mr. Gioe that he received no money and he had no difficulty with the Government about that part of it on income tax matters, and things like that.

By Mr. Tysinger: I don't see what that has to do with this habeas corpus case, Your Honor.

By the Court: How was that an issue in the first case? What he did with his income had nothing to do with the case that was tried in New York, did it?

By Mr. Stewart: Well, Your Honor, we will come to it [fol. 199] in Mr. Compagna's case, anyhow, one of these charges against——

By the Court: I am now undertaking to rule on a matter of evidence.

By Mr. Stewart: That is true, but I understand that is more or less informal, that is, if Your Honor will just hear it subject to whatever argument was made against its value, why, we might just put it in and then go ahead to the next matter.

By Mr. Tysinger: I object to introduction to encumber the record, it is wholly irrelevant and immaterial evidence which fundamentally can not be introduced in a habeas corpus case.

By the Court: I just don't see on what ground you seek to introduce that evidence in proceedings of this kind. It is entirely a question of fact.

By Mr. Stewart: Well——

By the Court: And that was tried in the New York Court, and this court can't review findings of fact in a habeas corpus proceeding.

By Mr. Stewart: If the fact that I am talking about goes to the jurisdiction of that court, I understand that fact is open to litigation here.

By the Court: No, the record in that case is conclusive on this court.

By Mr. Stewart: The record supports my position.

By the Court: What is that?

[fol. 200] By Mr. Stewart: The record supports my position, Your Honor.

By the Court: How? In what respect?

By Mr. Stewart: Because the record states that this conspiracy was formed in New York, and the record, we have a certified copy here, and we expect to make that part of our proof.

By the Court: Was that a defense in the criminal case? Did you raise that question in the criminal case, that the court had no jurisdiction because there was no offense committed in New York?

By Mr. Stewart: Yes, Your Honor.

By the Court: Well, it looks like to me that is conclusive on this court.

By Mr. Stewart: Well, I differ respectfully with the court concerning the law to be applied here, and I wish to make my record, that is, I can show Your Honor, here, Your Honor——

By the Court: Go ahead and make your record, and I will exclude the evidence,—you can put it in——

By Mr. Stewart: I think that would be——

By the Court: To raise your New York point, but I will exclude the evidence, if on final argument you convince me it is wrong I might consider the ruling then. I hold for the time the evidence is irrelevant and immaterial, and exclude it.

By Mr. Stewart: Eventually we will have to go by what Your Honor thinks of the value of the evidence. I would like the opportunity of putting it in now.

[fol. 201] By the Court: I say you may put it in now under those conditions.

Q. With reference to the money, did you ever get any money from Bioff or Brown?

A. No, sir.

Q. Did you ever get any money that was mentioned in that New York trial at all?

A. No, sir.

Q. And since the trial, and since your conviction, has the Government made any claim on you concerning any money which might have been obtained in that way?

A. No, sir.

Q. And you have had no trouble with the Government or any of the officials concerning your reports of income?
A. No, sir.

By the Court: Now that evidence is objected to, is excluded, and exceptions noted and allowed.

By Mr. Stewart: All right, Your Honor, I have come to a stopping place, Your Honor, I would like to have the witness read over his testimony given at the Congressional hearing before I ask further questions. Would you like to cross examine him now?

By Mr. Tysinger: We are going to make a motion. I would like to move, may it please the court, to strike the testimony concerning the parole board, what he is charged with by the parole board, by having violated it, and in connection with the appearance and hearing before the board since, for the reasons that the parole board has not passed [fol. 202] on whether or not this is a violation under the warrant on which he was arrested. It is premature to the extent he has been given an appearance, and the board has not either revoked or not revoked or released him, because the board has not yet met in accordance with the statute, and the statute says, in section—Your Honor is familiar with it—it is in its discretion to grant parole or revoke parole, after the hearing on it, under the warrant after being apprehended, and incarcerated and given appearance before the board, and the statute as applied, it takes the board, three entire members of the board have not completed their hearings. There is no evidence here by this petitioner, he and his counsel admit going before the board, admit, go into these facts, but my objection to that, it was irrelevant because it is within the jurisdiction of the board, especially since the board has not had the opportunity to either revoke or not.

By the Court: The Board had an opportunity to give him a hearing, and if what has been afforded him is not a legal hearing, I think that might be an issue of this proceeding.

By Mr. Tysinger: But that, the board has not taken final action on it.

By the Court: Well, when the board does take final action, apparently it will base its decision on the hearing. I don't think it is a hearing, from the allegations, from the evidence.

By Mr. Tysinger: I just want to call Your Honor just a

minute, to this particular section, 716, Title 8 of the Code. If the prisoner has been retaken upon a warrant issued by [fol. 203] the Board of Parole, he shall be given an opportunity to appear before said board, which was done in this case, of parole, a member thereof, or an examiner designated by the board, the said board may then or at any time within its discretion revoke it or terminate it. (Reads from code section.) That's what I am objecting to.

By the Court: Well, I have a very serious question in my mind as to whether or not just granting a man an appearance before the board, that, according to your construction, he might just walk in one door and go out the other, and I don't believe that is the spirit of the Act. I don't know, I want to consider it. But to my mind, allowing a man to appear before the Board means to appear for a fair hearing, to present his side, and as well as to hear the other side.

By Mr. Tysinger: Certainly, and I don't mean for the court to get any, that I have any such construction as a man going in one door and out the other door. This petitioner testified this morning about the five questions that they went into before the board, and he was given an appearance, but what I am talking about, was the last clause of this section of the Act of Congress, which says "in its discretion", and I said the board has not had the opportunity, has not revoked, and this, we claim, under the statute is irrelevant, and not admissible at this time in a habeas corpus proceeding until they have finally decided it.

By the Court: Well, I think it is a very serious question——

By Mr. Tysinger: It may be a serious question, Your Honor——

[fol. 204] By the Court: As to whether or not this whole proceeding isn't premature, and the court has to await at least a reasonable time and even then the remedy might be mandamus, rather than habeas corpus.

By Mr. Tysinger: Exactly, Your Honor, that's my point. I want my objection to go to that extent.

By the Court: I think I will hear the evidence, and I will entertain a motion to exclude it later on, but all the parties are here, and I don't think it would be wise not to hear the people, the witnesses.

By Mr. Tysinger: Sure, but I want to reserve my right in the record.

By the Court: I will reserve my decision and allow you to present the matter later on. You can go ahead with your investigation. This is a question that has troubled the court in a good many cases, whether or not the procedure measures up to statutory constitutional privileges is a question I would like to have fully presented. Just what is meant by an appearance, and how long the board may have in which to reach a decision. In other words, could they have a mandamus appear and then wait for a year or more, we'll say, to pass on the question as to whether or not it said it is within its discretion to decide the question at a period of time within the discretion of the board, whether that means a reasonable discretion, and not just any arbitrary action the board may take. All of those questions I think are in this case. You may proceed.

By Mr. Stewart: I would like to give Judge Tysinger the opportunity to cross examine now, or cross examine later when I put him back on.

[fol. 205] By Mr. Tysinger: We don't see anything to cross examine him for.

By the Court: All right, you may go down.

(Whereupon the witness is excused from the stand.)

Louis Compagna: Having been sworn, testified as follows:

Direct examination.

By Mr. Stewart:

Q. Will you state your name, please?
A. Louis Compagna.
Q. What is your address?
A. 2927 Maple Avenue, Berwin, Illinois.
Q. Is that a suburb of Chicago in Cook County, Illinois?
A. That's right.
Q. It was your residence at the time you went to New York and were convicted in New York?
A. Yes, sir.
Q. And your situation is the same as Mr. Gioe's with reference to having been in prison and released on parole?
A. Yes, sir.

Q. You were released at the same time?

A. Yes, sir.

Q. Now, in a general way, you made application for that parole on a blank that was supplied to you, did you?

[fol. 206] A. I did, sir.

Q. And that was all done in good faith and in regular order?

A. Yes, sir.

Q. You didn't deceive the board or do anthing like that?

A. Nothing.

Q. Didn't commit any fraud in obtaining the parole?

A. No, sir.

Q. And you accepted your parole in good faith, did you?

A. Yes, sir.

Q. Now, since you were on parole, where have you been residing?

A. 2927 Maple, out on Maple Avenue, Berwin, Illinois.

Q. With whom?

A. My family, my wife and children.

Q. And your family consists of your wife and how many children?

A. Three.

Q. And have you other places which you might also refer to as home?

A. Yes, sir.

Q. And where are they?

[fol. 207] A. Fowler, Indiana, and Berrien Springs, Michigan.

Q. You own farms there, do you not?

A. That's right.

Q. Now, are you engaged more or less in the operation of these farms?

A. Supervising and operation, yes.

Q. That is your occupation?

A. Yes, sir.

Q. Now, the occupation you have been following, and the place you have been living, has that been with the knowledge and consent of your parole supervisor?

A. Yes, sir.

Q. Who is in immediate charge of your case in Chicago?

A. ——.

Q. What is his position?

A. Probation officer.

Q. And is he under the jurisdiction of Mr. Fisher, the chief probation officer?

A. Yes, sir.

Q. When you were released on parole, were you handed a paper giving a list of rules and regulations?

A. Yes, I was.

Q. Did you read and study them?

A. Yes, sir.

[fol. 208] Q. And discuss the matter of your conduct with your parole officials?

A. Yes, sir, I did.

Q. And have you lived up to those rules?

A. Yes, sir, I did.

Q. Have you violated your parole in any way?

A. No, sir.

Q. When were you arrested on a parole violator warrant?

A. On the 23rd of—well, not with the warrant.

Q. What happened in your case, they didn't have the warrant with them, isn't that right?

A. That's right.

Q. And you reached the institution before the warrant arrived there?

A. That's right.

Q. But anyhow, they took you to the institution here in Atlanta?

A. That's right.

Q. And you are there a prisoner?

A. That's right.

Q. At the time you were made prisoner in Atlanta, were you informed of the nature of the charges?

A. No, sir, I was not.

Q. And when did you first learn of this paper, we call it [fol. 209] a referral, was that after you had been a prisoner for a while?

A. Yes, sir.

Q. About how long had you been in Atlanta?

A. Oh, I would say five or six weeks.

Q. And on the same day, September 8th, last, were you taken before these two gentlemen mentioned here as members of the parole board, Dr. Killenger and Judge Moskowitz in Atlanta?

A. Yes, sir.

Q. And who was present besides yourself?

A. Chief parole agent of the penitentiary, Mr. Goodwin, and two court reporters, I guess.

Q. And these members of the board?

A. Mr. Moscowitz.

Q. And did you go before Mr. Gioe or after?

A. Before.

Q. And—before you went in before the board on September 8th, had you discussed with me the matter of certain rights that you intended to request?

A. Yes, sir, I did.

Q. And did you have with you a copy of the letter I had furnished you?

A. Yes, sir, I did.

Q. And in a general way did that letter ask for the right of counsel, and the right to produce witnesses, and the right to hear what was against you?

[fol. 210] A. Yes, sir.

Q. And did you make a request for those rights?

A. I did, sir.

Q. And were they afforded you?

A. No, sir.

Q. What did the hearing consist of, just questions by the parole board members?

A. That's right.

Q. And taking these matters up specifically that are in the referral, I will take up these three first, because that is first in point of time. "Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth." Now, is it true that you took an airplane from Kansas City to Chicago after you were released on parole from Leavenworth?

A. Yes, sir.

Q. And who was on that trip?

A. Charles Gioe and Paul DeLucia and Mr. Bernstein.

Q. And have you named all the people who were known to you?

A. Yes, sir.

Q. And were there other members of the traveling public on the plane?

A. Yes, sir.

Q. And had you anybody else with you?

[fol. 211] A. No, sir.

Q. And when were you first asked about who might have been with you on the airplane flight from Kansas City to Chicago?

A. Oh, I judge around a couple of months after I was home, if not a little longer.

Q. While you were on parole?

A. That's right.

Q. And who asked you?

A. I just don't recall, whether it was Federal Bureau of Investigation man, or whether it was at the Congressional, I just don't recall which one.

Q. It was somebody investigating the matter either for the Federal Bureau of Investigation or either the Congressional Committee, is that right?

A. Yes, sir.

Q. And did you answer their questions?

A. I did, sir.

Q. And did you tell them substantially what you told the judge here?

A. Yes, sir, I did.

Q. And is that the truth?

A. Yes, sir.

Q. And were you questioned about that again by anybody?

A. Yes, by the parole board.

[fol. 212] Q. And where were you at the time you were questioned?

A. At the Atlanta Penitentiary.

Q. And did you make the same answer you have given to the judge here?

A. Yes, I did.

Q. And are they the truth?

A. Yes, sir.

Q. And were you questioned in general before the Congressional Committee, while they were having their hearing in Chicago, you appeared as a witness?

A. Yes, I did.

By Mr. Tysinger: May it please the court, I wish the same objection made as in the other case.

By the Court: I understand, the same objection would apply to the questions and answers here as in the other matter.

By Mr. Tysinger: All concerning this matter about the parole board.

By the Court: Yes, the same ruling I made in the other case is applicable here.

By Mr. Tysinger: That is all right.

Q. During your examination before the Congressional Committee, you were asked these questions about this flight from Kansas City to Chicago?

A. Well, I just don't recall whether I was or not.

[fol. 213] Q. Well, I would like the same opportunity, Your Honor, to show Mr. Compagna that testimony.

By the Court: You can show what the testimony would be, and then I will make the same ruling. I am not admitting it except for the purposes of the basis or formation of grounds for your objection.

By Mr. Stewart: Possibly Your Honor didn't fully understand my last statement. I am referring to the public set of hearings, and Mr. Compagna was a witness before that body, and that legally constituted body. My memory is he was not asked anything about the flight, you see, and his——

By the Court: I thought you were preparing to introduce the same line of testimony that you introduced in the other case.

By Mr. Stewart: Well, it's just a little different.

By the Court: All right, go ahead, and I will pass on it as you come to it.

By Mr. Stewart: All right, sir. I would like to give Mr. Compagna an opportunity to check with that record, because as I remember it, he was not asked about the airplane trip now before the Congressional Committee.

Q. You think I am correct in that now?

A. I think you are, yes, sir.

Q. And were you called before the grand jury committee in Chicago since you were on parole?

A. Yes, sir.

By the Court: Witness in what case?

[fol. 214] By Mr. Stewart: It was a general investigation, Your Honor.

Q. Did they tell you what case you were on when you were before the grand jury?

A. No, sir, they did not.

Q. And is it a fact, Mr. Compagna, that you and I discussed the matter that you might be questioned by various bodies and various officials?

A. Yes, sir.

Q. And you were advised to answer any questions any one might want to put to you, is that right?

A. Yes, sir, that's right.

Q. And that has been your attitude, has it?

A. That's right.

Q. And every time you have been asked, you have answered questions?

A. Yes, sir.

Q. Have you answered them truthfully?

A. Yes, sir.

Q. Now do you remember in a general way before, when you were before the grand jury, as a witness, in Chicago, were you asked questions about the airplane trip?

A. Yes, I was.

Q. And did you make answers substantially the same as you have told Judge Underwood here?

[fol. 215] A. Yes, sir, I have.

Q. And that is the truth?

A. It is.

Q. While you were in the penitentiary, serving your sentence originally before you obtained your parole, were you told that the government was making claims against you for some income tax based upon the money which was supposed to come out of the proceedings in New York as testified to by Bioff and Brown?

By Mr. Tysinger: I want to object to that, Your Honor, as irrelevant and immaterial. It has nothing to do with the habeas corpus case.

By the Court: I sustain the objection, but allow you to put it in the record so you will have a record.

By Mr. Stewart: I will argue it altogether, but preliminary to the charge that is in here, I might acquaint the charges were failures to reveal source of money used in settlement of it, before a legally constituted body. In order to meet that charge I have to show the preliminary——

By the Court: That the charge of the parole board?

By Mr. Stewart: Yes, Your Honor, but that matter is quite material. We will argue that when we have finished.

By the Court: All right, you may ask the question.

Q. Now, is it true that after you were convicted originally in the case, before you obtained your parole, that you were [fol. 216] informed in a general way that the Government

wanted some taxes from you, based upon the testimony given by Bioff and Brown?

A. Yes, sir, it is.

Q. And had you received any such money?

A. No, sir, I have not.

Q. And did you have an attorney to represent you in the matter of a claim based upon that matter?

A. Yes, I did.

Q. Who was your attorney?

A. Eugene Bernstein.

Q. And did he see you while you were in the penitentiary before you obtained your parole?

A. Yes, sir, he did.

Q. And did you discuss the matter of these tax claims?

A. We did.

Q. And you have learned since, have you not, that those claims were settled by Mr. Bernstein in your behalf?

A. Yes, I did.

Q. And——

By the Court: Well, now, was that a settlement?

By Mr. Stewart: While he was in the penitentiary, Your Honor, the settlement was made.

By the Court: Prior to the——

By Mr. Stewart: Parole. Prior to the time he obtained his parole.

[fol. 217] By the Court: And the parole board made this investigation itself?

By Mr. Stewart: Well, may I go back just a little very briefly, the parole board members that testified before the Congressional hearing, as far as they were concerned, they didn't know anything about the tax claim at the time the parole was granted, and they learned this after the Congressional Committee started digging into the matter. And then the Congressional Committee summoned the members of the Internal Revenue and all the tax people before the Congressional Committee. These people refused to testify, but Mr. Bernstein, representing these folks in the tax matters volunteered the information to them and told them that that tax had been settled, and that settlement had been made with the approval of the Government attorneys, and the United States Tax Court, and then these men were granted parole, and after they were out on parole, why, and after we obtained the referral making the charges, the

parole board now charges Mr. Compagna with failure to reveal sources of money in settlement of Internal Revenue tax when questioned before a legally constituted body.

By the Court: That is the question I asked, whether or not the parole board had that information at the time they acted upon the parole.

By Mr. Stewart: When they originally granted parole, I don't believe they knew anything about the tax matter at all.

By the Court: Well, that is what——

By Mr. Stewart: From their testimony. I do remem-
[fol. 218] ber*ed* distinctly Mr. Rogers testified he didn't know anything about the taxes until after this Congressional matter was brought up.

Q. And do you remember that after you were out on parole, when you were before the Congressional hearing in Chicago, you were asked questions concerning a tax settlement?

A. Yes, I do.

Q. And did you tell that body the truth concerning your settlement, as far as you knew it?

A. Yes, sir, I did.

Q. And then when the board came down here on September 8th, did they ask you questions concerning that settlement?

A. Yes, they did.

Q. And did you make truthful answers?

A. Yes, I did.

Q. Now——

By the Court: Now, was that settlement a settlement of claims arising out of the original, the proceeds you are supposed to have received from the original conspiracy?

A. Well, they had some in there, Your Honor, from the original proceeds they claimed and from my partnership and business I was in.

By the Court: It included part of the money you were supposed to have received as a result of the conspiracy.

[fol. 219] A. Yes, Your Honor.

By Mr. Stewart: And if I understand——

By the Court: Will you pardon an interruption, please.

By Mr. Stewart: Yes, sir.

(Short recess called.)

By the Court: All right.

By Mr. Stewart:

Q. Going back to your original tax return, is it a fact that while you were out, and before you were convicted in New York, you made regular tax returns to the Government on your income, did you not?

A. Yes, sir, I did.

Q. And if I understand correctly, they never questioned them, did they?

A. No, sir, they did not.

Q. I mean when they reopened the whole thing to go after you again, they didn't claim that those returns were wrong, did they?

A. No.

By the Court:

Q. Have you included in those returns any funds received from this alleged conspiracy?

A. No, I did not.

Q. As a matter of fact, then, if your settlement was correct, you had not made a proper return, had you?

[fol. 220] A. I had nothing to do with the case, they had everything.

Q. I thought you said you settled it?

A. I did settle it because this is a settlement of my business concern and my partner, they settled everything altogether.

By Mr. Stewart:

Q. Is it a fact that the Government had placed liens on your farms?

A. Everything, yes, sir.

Q. Did you always protest you did not owe the money?

A. Yes, I did.

Q. And did you think it good business under all the circumstances, taking all circumstances into consideration, to make a settlement?

A. Yes, I did.

Q. And so you settled for a claim made by the Government that you were protesting?

A. Yes, sir.

Q. And that settlement was approved by the tax court?

A. That's right.

Q. And you have learned since, have you not, that some of the money used in the settlement was money which had been advanced to Mr. Bernsteon?

A. Yes, I have.

[fol. 221] Q. Now, do you know who those persons are?

A. No, I do not.

Q. And since you were out, have been out on parole, did you make any effort to find out who they were?

A. No, sir, I did not.

Q. And did you give your reasons for not making that effort to the parole board on September 8th?

A. Yes, I did.

Q. Will you state to the judge your reasons as you gave it to them?

A. Well, some of the people I was connected with were gamblers and speculators, and I didn't think it was my proper right to be going and visiting these people while I was on parole, I figured anybody I would owe any money, they could contact me at home, and I would have to report to the parole agent first before I made any move, paid any money at all.

Q. And you told the board, and you are of the opinion that it was better for you not to inquire around among the people you had formerly associated with?

A. Yes, I did.

Q. As a matter of fact, since you have been on parole, have you stayed away from people you originally associated with?

A. Yes, I have.

By the Court:

Q. Take these particular individuals you have just been speaking of——

[fol. 222] A. Yes, sir.

Q. The ones who undertook to enter into a business relationship with you, had you been with them socially? Have you been associated with them socially?

A. When I was home before on and off I did.

Q. Before?
A. Before this parole, this conviction.
Q. I mean after the parole.
A. No, sir, I did not.

By Mr. Stewart:

Q. After your parole was granted, and you went back to Chicago, and to your various farms, who have you associated with in a general way?
A. My wife and children.
Q. And have you been in the company of your wife a large part of the time?
A. Yes, I have.
Q. And have you done anything during that time which was contrary to your instructions, or in any way a violation of parole?
A. No, sir, I have not.
Q. Now, the next specification here is a general one, "failure to conduct himself honorably." Have you failed to conduct yourself honorably while you have been on parole?
A. No, sir, I have not.
Q. Were you asked any questions by the parole board on [fol. 223] September 8th, which would indicate that there was anything more definite concerning that?
A. No, there wasn't.
Q. Have you told us in a general way the substance of the questions that were asked you by the parole board on September 8th?
A. Well, I have, about the income, they couldn't understand how people could pay it and me not know nothing about it, and I said, well, the income was straight, the case was straightened out, and closed in '46, and I was in the Penitentiary at the time, and, well, they said, don't it seem funny that people would pay that kind of money for you, and you wouldn't know nothing about it, and I said, it does seem funny, but I still don't know nothing about it. If I did, I would have reported to the parole board, because I would have to put on the application of what I paid out, and——
Q. Were the reports you made to the parole officials in Chicago truthful?
A. Yes, they were.

Q. And did you keep the parole officials acquainted with your movements and what you did?

A. Yes, sir, I did.

Q. Did you ever receive any complaint from them that you had done anything in violation?

A. No, sir, I did not.

Q. Now have you told us in a general way the substance of questions that were asked you on September 8th by these members of the parole board?

[fol. 224] A. Yes, they asked me about the plane trip, and going to Kansas City, and asked did I have permission for it, and I said, well, the warden and the, one of the head officials on there said, well, have you got the amount to get home by plane, you can get home, and we got to the bus station at Leavenworth, I want in to Mr. Bernstein, and we got into the car and went to the airport.

Q. And the answers you gave were truthful on September 8th?

A. Yes, they were.

Q. Before you went to New York to stand trial in the original case, where were you living?

A. 2927 South Maple Avenue, Berwin, Illinois.

Q. Have you been in New York in the matter of business that was testified to there?

A. No, I was not.

Q. And had you had any dealings with Bioff and Brown concerning that business?

A. No, sir, I had not.

Q. And did Bioff and Brown, or others than either one of them ever give you any money coming out of that——

By Mr. Tysinger: Your Honor please, I want to renew my objection to this, that pertains to the trial in New York.

By the Court: Yes, that line of questions and answers, I am sustaining the objection and excluding it, but you may put them in the record so you can have proper exceptions to it.

[fol. 225] Q. Well, then you might answer the last question. Do you remember what it was?

A. No, I dont.

(Reporter reads last question.)

A. No, sir, they have not.

By the Court: Any other questions?

By Mr. Stewart: That's all, Your Honor, now.

By Mr. Tysinger: May it please the Court, the same as in the Gioe case, I want to make the objection under the statute, the matter in regard to the parole board is irrelevant and immaterial and not admissible because the parole board has not acted on it, and in its discretion, under the statute, everything has been complied with so far except the final order of the parole board, and that is a matter within their own knowledge of the parole board, as to whether or not these particular questions concerning the violation of the parole have not been violated, is the same as I have in Gioe——

By the Court: That is one of the issues made by the petitioner; if it isn't sound, of course the whole case goes out; if it is sound, the evidence is relevant. I will leave it in the record for determination upon the final decision of the case.

By Mr. Tysinger: With that from you, I want to ask you a question or two, of Mr. Compagna, the fact it has been left in the record over my objection.

Cross-examination.

By Mr. Tysinger:

Q. Mr. Compagna, in the tax business, how much were your taxes paid by somebody else?

[fol. 226] A. I just don't recall what they were.

Q. You have some idea about it?

A. Eighty or ninety thousand plus the interest, whatever that would have been.

Q. Eighty or ninety thousand, plus the interest?

A. Plus the interest.

Q. You mean to tell the parole board you didn't know who paid them?

A. That's right.

Q. Why didn't you know? You were out on parole all that time.

A. I didn't associate with anybody but my immediate family, so——

Q. Couldn't you find out who paid eighty or ninety thousand dollars plus interest, and not have associated with them? You have your lawyer, Mr. Stewart, and other lawyers in the matter.

A. Well, I figured they were naturally friends of mine, they would some way or other find a way to receive their money back.

Q. Eighty or ninety thousand dollars?

A. That's right.

Q. Just left it that way, didn't even find out who paid it?

A. That's right.

By the Court:

Q. Do you know it had been paid?

[fol. 227] A. Yes, I knew '46 had been paid.

By Mr. Tysinger:

Q. And you knew who paid it?

A. No, I did not.

Q. You know it had been paid, but didn't know who paid it?

A. That's right.

Q. Couldn't you go to the collector's office in Chicago or New York, wherever it was, and find out?

A. They didn't say anything about it at the Congressional, I don't see how I could have got that information.

Q. You couldn't get the information?

A. Who paid it.

Q. From the collector of Internal Revenue now in paying your eighty or ninety thousand dollars?

A. I think as far as the actual payment and closing of the case, it was my attorney.

Q. Your attorney? Who was your attorney?

A. Mr. Bernstein.

Q. Mr. Bernstein?

A. Yes, sir.

Q. Is it the one under indictment now?

A. I guess so, yes.

Q. But he disclosed who it was to you, but he didn't disclose to the parole board?

[fol. 228] A. He didn't disclose nothing. He said he didn't know.

Q. He told you he didn't know who paid the taxes?

A. That was the conversation I heard him saying at the Congressional meeting.

Q. At the Congressional meeting?

A. Yes.

Q. After the Congressional meeting you were still on parole for a while?

A. Yes, sir.

Q. Did you make any effort to find out who paid your taxes then?

A. No, I did not.

Q. You didn't make any effort to find out who you owed this eighty or ninety thousand dollars plus interest?

A. No, I did not.

Q. I believe you testified in answer to His Honor's inquiry, that part of this assessed income was due for an enterprise which was in the conspiracy and part of it in your partnership?

A. I think that's right.

Q. A legitimate enterprise?

A. Well, I wouldn't say it is legitimate, I guess it's gambling

Q. Gambling?

A. Yes, sir.

[fol. 229] Q. That partnership enterprise is gambling?

A. Yes, sir.

Q. What kind of gambling?

A. Horses.

By the Court:

Q. What?

A. Race horses, horses.

By Mr. Tysinger:

Q. Race horses, and you mean to tell the United States court——

By the Court:

Q. Did you engage in this partnership activities while you were on parole?

A. No, I did not.

Q. Did you pay income tax on this while you were on parole?

A. No, sir, I did not.

Q. Did you return those earnings?

A. Yes, sir, it was all '34 or '35, I don't know exactly when they took it up.

Q. Have you paid anything on that?
A. No, sir, I have not.
Q. This settlement you referred to, I understood you to say part of it was for alleged conspiracy, and the other for partnership activities?
[fol. 230] A. Yes, sir, that's what I understand it to be.
Q. Both paid at the same time?
A. They combined it, yes, sir.
Q. This eighty or ninety thousand dolllars was a settlement for both?
A. For everything.

By Mr. Tysinger:

Q. Who told you that?
A. The lawyer.

By the Court:

Q. You knew about the partnership payment, did you?
A. Yes, sir.
Q. Did you disclose that to the parole board?
A. No, sir, I did not. They didn't ask, they asked as a whole——

By Mr. Tysinger:

Q. Now, Mr. Compagna, they asked you about your taxes and you didn't give them any information how it was settled, did you?
A. The only question they asked about my taxes, who paid, they figured I know who paid, and I didn't know, and I said I didn't know, and I don't know.
Q. You said you didn't know and you don't know?
A. That's right.
Q. Yet your lawyer knows it was paid, knows when it [fol. 231] was paid, and told you so, and you don't know who it was?
A. That's right.

By the Court:

Q. Did you know it was paid?
A. Yes, sir, he told me it was paid.
Q. You knew that was paid during your——
A. Confinement.
Q. Your probation?

A. No, I was in confinement at the time, it was paid in '46.

Q. Before your probation, your parole?

A. Yes, sir.

By Mr. Tysinger:

Q. Since you have been out on parole, you have known facts concerning the payment?

A. No, I have not, other than the attorney said he took care of it.

Q. Did Bernstein see you then when you were on parole?

A. Yes, he has.

Q. And he told you about it?

A. About what?

Q. About your taxes being paid, settled?

A. Yes, sir, that's right, that's right.

[fol. 232] Q. And you discussed it with him?

A. No, I didn't discuss it, all he said to me, it's paid, and taken care of.

Q. It's paid and taken care of?

A. That's right.

Q. And that was your individual income tax assessed that was not returned?

A. That's right.

Q. And you didn't know, you told the Board of Parole, and are telling His Honor here in this court, you don't know who paid those taxes?

A. That's right.

By the Court:

Q. Let me see if I understand you, this settlement you referred to——

A. Yes, sir.

Q. Is an income tax settlement consisting of two items, one claim of the Government arising out of the alleged conspiracy, and the other arising out of gains from your gambling partnership.

A. Well, Your Honor, when I talked to the attorney——

Q. Answer that question and then explain, is that correct or not?

A. Well, I would have to explain it.

Q. Explain it afterward, whether or not, I just wanted to know if I understood your testimony correctly.

[fol. 233] A. That is the way the attorney explained it to me, Your Honor.

Q. All right, so you got that information while you were in the penitentiary?

A. Yes, sir.

Q. And it was paid while you were in the penitentiary?

A. Yes, Your Honor.

Q. And you knew it had been paid, but you didn't know who paid it?

A. Yes, Your Honor.

Q. And it was paid out of your funds?

A. No, it was not paid out of my funds.

Q. Who was it paid?

A. Friends.

Q. Friends paid it?

A. Yes, sir.

Q. Well, when you filed your application for parole, did you say anything about that at all to the parole board?

A. No, I did not.

Q. When was the first time, if ever, you ever mentioned it to the parole board?

A. Well, at the Congressional it was mentioned, was the first time it was ever mentioned.

Q. The parole board didn't know anything about your income tax trouble until after parole had been granted?

[fol. 234] A. Well, the institution knew all about it?

Q. I'm talking about the parole board now.

A. I don't know, sir.

By Mr. Tysinger:

Q. One more question. The only time you ever gave any information concerning your income tax business was when you were called before the Congressional Committee to testify, and they knew about it, asked you about it?

A. They asked me about it, yes, sir.

Q. But you never did give any information to the parole board on your application for parole while you were in the institution although you knew the tax had been paid?

A. No, I did not.

Q. Huh?

A. No, sir, I did not.

Q. All right, that's all.

Redirect examination.

By Mr. Stewart:

Q. Were you asked anything about that while you were applying for parole?

A. No, I was not, it was more of a civil case.

Q. Was there anything in the blank form you were asked to fill out that called for information about your tax relationship with the government?

A. No, sir, there was not.

[fol. 235] Q. And the tax returns that you had made, they had been made to the Government and paid, isn't that right?

A. That's right.

By Mr. Stewart: And if I may state there, Your Honor, I don't claim any great knowledge about the taxes, but I am told that the original returns were not disturbed except they added this money to them. I mean I think that is the fact, if it makes any difference. Your Honor seemed to indicate by the questions Your Honor asked that it made some difference. Mrs. Compagna is a partner of her husband and she probably knows a little more about that, because she was out, and he was in but she told me that the Government did not question the correctness.

By the Court: Well, you can put her on the stand if you wish.

By Mr. Stewart: All right, we might do that, Your Honor.

By the Court: Anything else of this witness?

By Mr. Stewart: That will be all.

By the Court: You may go down, Mr. Compagna.

A. Yes, Your Honor.

(Whereupon the witness was excused from the stand.)

Mrs. Louis Compagna: Being duly sworn, testified as follows:

Direct examination.

By Mr. Stewart: I told Judge Tysinger I didn't expect to call Mrs. Compagna, he was questioning whether she [fol. 236] should be in the room. I didn't know this was going to arise, and he tells me he has no*t* objection, I was going to ask about the taxes.

By Mr. Stewart:

Q. What is your name?
A. Mrs. Louis Compagna.
Q. Your residence?
A. 2927 Maple Avenue, Berwin, Illinois.
Q. With whom do you live there?
A. My children.
Q. And you are the wife of Louis Compagna, who just left the stand?
A. That is true.
Q. Are you occupied or engaged in any business?
A. I am taking care of our two farms right now since my husband is away.
Q. During the years that had been mentioned prior to the time your husband was convicted in New York, were you engaged in any business?
A. I was in partners, that is with, maybe you would call it partners in the farm and I also have a store of my own I take care of.

By the Court: Will you speak a little louder please?

Q. Where was the business conducted in the store?
A. I have a flower shop.
[fol. 237] Q. Where was that located?
A. 2408 West Chicago Avenue in Chicago, Illinois.
Q. What name it is conducted under?
A. The Orchid Flower Shop.
Q. How long were you in that business?
A. Since 1934.
Q. Are you in that business now?
A. Yes, sir.
Q. And in your tax matters with the Government, do you make a joint return with your husband?
A. I do now, yes, sir.
Q. And during the years brought in just prior to the conviction of your husband, were your returns made jointly by you?
A. No, sir, they were individual.
Q. And did your husband have an interest in your florist business?
A. No, he has not.
Q. That is separate?
A. That is separate.

Q. And, but you knew in a general way that you filed returns, and your husband had filed returns on his income prior to the time he was convicted?

A. Yes, sir.

Q. Then later on after he was convicted and while he was in the penitentiary in Leavenworth, or Atlanta, did [fol. 238] the Government raise some question as to the correctness of the returns made by your husband?

A. Yes, they did.

Q. And were liens levied on your property including your farms?

A. Yes, they were.

Q. And did you consult an attorney?

A. I did. I consulted Mr. Eugene Bernstein.

Q. Now, am I correct in saying that after the Government questioned the correctness of your husbands' returns, did it turn out that the only difference——

By Mr. Tysinger: Your Honor, I object to him testifying to the record, he can ask what the Government did, if she knows.

By the Court: Don't lead the witness.

By Mr. Stewart: Well, it's sort of summarizing something, I can, all right, I was afraid if I asked it the other way he would object to that, so I will ask it the way he would like to have it asked.

Q. Explain in a general way the nature of this claim that was made while your husband was in the penitentiary?

A. Well, you mean from the, how I got it, whether I got it through the mail or whether it was brought to me? I don't quite understand.

Q. Just tell in your own way what——

A. Well, I don't remember the exact date, but it was somewhere in 1944, I believe, that they served this tax [fol. 239] matter on me, and I knew nothing about it. They used me as a transferree in my husband's income, so right then I consulted an attorney and turned it over to him, and from there on in he did everything else except to ask me the few fundamentals he wanted to know.

By the Court:

Q. Well, you explained the situation with respect to the partnership that your husband testified to that existed between you and him?

A. Well, sir, there was no partnership between my husband and I, this is all pertaining to him, without me.

Q. I am speaking particularly about his race track gambling.

A. That I know nothing about. I had no dealings with that whatsoever. They just used me as a transferee, being his wife, I mean on his income tax, and I knew nothing about it.

Q. There was no partnership?

A. No, not with my husband and I, I had nothing to do with it.

Q. Well, now, in the settlement that he referred to with his income matters, the two items, one arising out of transactions involved in the alleged conspiracy, and the other with respect to his race track gambling, do you know about how that was?

A. All I know, Your Honor, is that they brought me all these amounts of money that I knew nothing of. I don't know what they pertained to, or anything about it, excepting that they said he owed that amount of money, [fol. 240] and that was all there was as far as I know. So I turned it over to an attorney, and let him work on it from there on with the help of my husband. After he went into it, the attorney was allowed to go in and consult him on those matters. From there on in I had nothing more to do with it except that I was told that the thing was paid and that's all I know about it.

By Mr. Stewart:

Q. Were you of the opinion that would help your husband in his application for parole if you made settlement of these claims?

A. Yes, that was the purpose of the settlement.

Q. And were you advised that would help him get parole?

A. That was the reason why we consulted the attorney to settle it so he could apply for parole.

By the Court:

Q. Did that question come up with the Government officials during the negotiations?
A. Well, I don't know.

By Mr. Stewart:

Q. But it was discussed between you and the attorney?
A. And my attorney, yes, sir.
Q. And you were of the opinion it was good judgment to go ahead and settle it?
A. Yes, I did think it was good judgment to settle it.
[fol. 241] Q. Regardless of whether or not it could be proved?
A. True or not, yes, sir.

By the Court: Any questions——

By the Court:

Q. Did you furnish any of your funds for your husband to carry on the business transactions?
A. No. sir.

Cross-examination.

By Mr. Tysinger:

Q. I didn't understand that last answer, Mrs. Compagna, about the funds that were paid taxes on, do you know anything about them?
A. No, I do not.
Q. Who paid them?
A. Mr. Bernstein paid them.
Q. Mr. Bernstein paid them?
A. Yes.
Q. He told you he paid them?
A. He told me money was brought in to him by certain individuals and he paid the taxes on that, that's all I know.
Q. By certain individuals?
A. Yes, sir.
Q. Who were the certain individuals?
A. That I do not know.
[fol. 242] Q. You asked him?
A. I did. He said he didn't know either.
Q. Didn't know who brought the money in?

A. No, sir, he did not.

Q. Eighty or ninety thousand dollars, plus interest. Do you know how much it was?

A. Well, it was eighty or ninety thousand dollars, plus interest, yes, sir.

Q. Who did Mr. Compagna owe for this benevolent way of paying taxes?

A. I don't know, we never made inquiry.

Q. Nobody? Did you make any inquiry to find out how your husband——

A. No, sir, I have not.

Q. Didn't you think it strange that somebody paid eighty or ninety thousand dollars, plus interest?

A. No, I didn't.

Q. And not be obligated to anybody?

A. No, I don't think it's strange because we have got some very nice friends.

Q. Friends that gave eighty or ninety thousand dollars to the United States Government, plus interest, as a gift of friendship?

A. That I didn't say was a gift.

Q. Well, who was billed, you or your husband, for taxes, nobody ever called on you to pay them back?

A. No.

[fol. 243] Q. Nobody ever has?

A. No, sir.

Q. And that was two years ago they were settled?

A. Yes, sir.

Q. Do you have any idea who paid them?

A. No, I haven't.

Q. Did your husband ever discuss it with you?

A. No, sir.

Q. While he was on parole?

A. No.

Q. And you never discussed it with him?

A. No, sir.

Q. Mrs. Compagna, I believe you testified on direct examination that you understood if you paid the taxes he would have a better chance at parole?

A. Yes, sir.

Q. Where did you get that information?

A. Through my attorney.

Q. Who was your attorney?

A. Mr. Bernstein.

Q. And he is the one that informed you of that position to take in paying the taxes?

A. That's right.

Q. Well, when he gave you that information, did he ever [fol. 244] state who was going to pay the taxes, or how the money had to be raised to pay the taxes?

A. No, sir.

Q. Did he ever inform you how much the taxes were before they were paid?

A. Why, I had all the receipts on them.

Q. You got receipts?

A. That is, I knew what the amount was.

Q. Who signed the receipts?

A. The Government.

Q. Collector's office.

A. Oh, no, you misunderstand, I mean I knew that the amount was up in the high figures.

Q. How much was the high figures?

A. Well, I think it was somewhere around four hundred thousand dollars, somewhere in there.

Q. And you found out how much the settlement was?

A. After it was settled.

Q. How much was the interest, Mrs. Compagna?

A. That I don't know truthfully.

Q. Did it run up around a hundred thousand dollars?

A. I wouldn't know.

Q. You wouldn't know. Did Bernstein tell you?

A. Well, I don't quite remember whether he did or not.

[fol. 245] By Mr. Tysinger: Come down.

(Whereupon the witness was excused from the stand.)

(At this point in the proceedings a recess was called for fifteen minutes.)

After Recess

By Mr. Andrews: May it please the court, we would like to open and read into evidence certain depositions which have been taken. I have one, it appears to be the deposition of the witness Morris Kostelanetz. I understand it is agreeable with the court to open and read it into the record at this time.

By Mr. Tysinger: Just let the record show it was opened in open court.

By Mr. Andrews: Upon being opened on the inside is found the notice of the original taking which I file with the court.

By Mr. Tysinger: Mr. Andrews, I have an exact copy of the deposition.

By Mr. Andrews: Also the original stenographic notes of the reporter.

This is the deposition of the witness Morris Kostelanetz as of the 14th day of October, 1948.

(Mr. Andrews reads deposition of Morris Kostelanetz.)

I want to have the record identified and filed with the clerk, the printed record. The reason I want to handle it in this way, we started to take the depositions by interrogatory, and due to the lack of time, decided to take it by oral deposition. I want it marked to that effect, Petitioner's Exhibit #1.

[fol. 246] (Interrogatory of Morris Kostelanetz marked Petitioner's Exhibit #1 for identification.)

By Mr. Andrews: May it please the court, I apply for permission to open what appears to be the deposition of Dr. G. G. Killinger and Judge Monkiewicz, the members of the parole board. Any objection to them being opened?

By Mr. Tysinger: No objection. Let the record show they were opened in open court.

By the Court: Leave out the formal parts and just get to the——

By Mr. Andrews: All right, sir. Are you ready to proceed with this, Mr. Tysinger?

By Mr. Tysinger: Yes, sir.

By Mr. Andrews: We started to taking the testimony by interrogatory and on account of the shortage of time, we decided to continue with depositions.

(Begins reading of deposition of George G. Killinger. Reading on page 10 of the record, from line 7.)

"We shall, however, be glad to have you submit in writing or in person at our headquarters any material or information bearing on these cases."

(Deposition of Morris Kostelanetz marked as Petitioner's Exhibit #2 for identification only.)

By Mr. Tysinger: It's "issues" in this.

By Mr. Andrews: This is the original.

(Mr. Andrews continues to read from interrogatory number 41.)

[fol. 247] Now the next witness called on depositions was Honorable B. J. Monkiewicz, member of that board. Interrogatory 49. (Reads.)

Now those next several questions there are identical with the ones just read. "Did Killinger," that is about the letter from Mr. Stewart to the Board, and the reply back. It's just repeated at that point. Will Your Honor give me a minute, and I think it will save fifteen or twenty minutes reading here, if it is just exactly the same.

Mr. Stewart, have you had a chance to examine those?

By Mr. Stewart: They look the same to me, as far as I have had the opportunity to examine them, especially in the answers.

By Mr. Andrews: I believe it is identical, as nearly as I can tell, with those in Dr. Killinger's testimony.

(Petitioner's exhibit number 3 deposition of Geo. G. Killinger.)

By Mr. Andrews: We ask leave of the court to open and read in open court the deposition of William Schwerdtfeber, taken in behalf of the Relators. Have you any objection?

By Mr. Tysinger: No, let the record show it was opened in open court. How do you pronounce the name?

By Mr. Andrews: I will just have to let you read it and pronounce it the way you want to.

I would like to have Your Honor's permission to staple this interrogatory to the deposition so they won't get detached or misplaced.

By the Court: All right.

[fol. 248] By Mr. Andrews: These might be separated. Mr. Tysinger, if you will refer to page 2——

By Mr. Tysinger: I have got it.

By Mr. Andrews: Interrogatories propounded to William Swerdtfeger.

(Interrogatory of Wm. Swerdtfeger marked Petitioner's Exhibit #4, and received in evidence.)

By Mr. Andrews: May it please the court, at the time this petition was deposited in the court, filed with the court, there was deposited an exhibit to the petition, an uncertified copy of the transcript of the record on the trial of the case of the United States against Compagna and others, Criminal 104-101. I would like to ask the court's permission to withdraw the uncertified copy and substitute therefor the certified copy which we now have.

By Mr. Tysinger: Is that a complete record of the trial?

By Mr. Andrews: It purports to be, sir.

By Mr. Tysinger: If Your Honor please, it is a large record, I haven't any particular objection other than it encumbers the record. Furthermore the case has been decided by the Sixth Circuit Court of Appeals, that record, unless he is attacking some part of the jurisdiction, I don't see that it is——

By the Court: What does that illustrate?

By Mr. Andrews: Mr. Stewart can better illustrate that, but primarily it relates to the question raised here of the use of the perjured testimony, and it also relates to the issue which the court declined to accept formally, but let [fol. 249] the evidence go on, as to whether or not the conspiracy was formed in New York as charged in the indictment, or whether, if formed in Chicago, as contended for, that the New York conviction might be void. It relates to both of those issues. If there are any other issues that we should refer to, Mr. Stewart will state them. I think both of those issues are present before the court.

By the Court: Well, to take the issue with respect to the question as to where the conspiracy took place. As I understand it, I have not read the record in the case, but as I understand it, that issue was raised in the trial court, and was determined by the trial court.

By Mr. Stewart: Your Honor is obtaining that understanding from the record, as to the record here it would be proper here to determine whether Your Honor is right, or our contention is right.

By the Court: No, I think the final decision, you have the pleadings, and you have the verdict, and the judgment of the court. I think the indictment charges that the conspiracy

took place in New York, and that issue was, as I understand it, was submitted to the jury as a matter of fact, and they found, as a matter of fact, that that issue was established.

By Mr. Stewart: Well, I don't believe Your Honor is making a correct summary, because this is a long record, and probably I am at fault a little because Your Honor made more or less of the same statement when I didn't challenge it. But the record itself will show that the defendants were foreclosed, that it was taken just as a matter of law, and the [fol. 250] indictment, as Your Honor has stated, on its four corners that indictment is good, I mean technically it is good. But when the facts came in, the facts did not fit the indictment, and the facts show that the conspiracy was formed in Riverside, Illinois, and that is undisputed from the record, and we need the record to show that. Now, as to how that was handled legally, that will show by the record too, and if I remember correctly, it was taken away from the jury and the judge wouldn't allow the question to be raised as a question of fact, and then when we went——

By the Court: What question do you mean, the question of jurisdiction?

By Mr. Andrews: That's correct.

By Mr. Stewart: That's right, Your Honor, that was taken away from the——

By the Court: Let's see where that was taken away from the jury.

By Mr. Tysinger: Your Honor, I have a decision of the Second Circuit I would like for you to see.

By Mr. Stewart: That is still another matter, I happen to be familiar with it because I took the case to the Circuit Court of Appeals, and I caused the printing of those records which Your Honor sees is a long record. The Circuit Court of Appeals took my objection which I am trying to make here now, which I tried my best to make clear there, they took it as if I were merely attacking the formal sufficiency of the indictment, which of course was not the point at all. They didn't decide the point that I raised. Now if I am correct in my understanding of the law of habeas corpus, [fol. 251] this is one of those matters that go to the very heart of the case, and the jurisdiction of the case, and it wouldn't make much difference what the Circuit Court of Appeals said about it, if they did say something about it, but it happens they didn't say anything about it, didn't

decide the question. They decided another question, something I had not talked about. So properly it comes up for a matter of argument, and I have that briefed up and I can point out from the instructions and from the various motions made that the defendant was not allowed to go into the matter as a question of failure on the proof of the facts, but even at that, they still would have a right on a habeas corpus proceedings for Your Honor to at least look to the record to see whether that court had jurisdiction. That is our point.

By the Court: I looked to the record to ascertain what the charges were. I looked to the verdict to see what the findings of the court, of the jury were, with respect to those issues and the judgment of the court on that verdict. Now to say that the court has to go into all the evidence in the case, and retry the whole case, I don't think that is the function of the habeas corpus court.

By Mr. Stewart: Now, may I show Your Honor that it can't be simplified as easily as that with reference to another case. I know Your Honor is familiar with it. Suppose we had here a matter where a defendant was claiming that the confession that was used against him was obtained by coercion and brutality. You wouldn't just look at the indictment and the judgment and the verdict. You would look at the rest of the record. It depends on what our point is, you see, our facts, what facts we need depend on what is your question. Now, I don't want to overlap and make an argument over and over again to [fol. 252] tire the court. The question now is whether or not we are entitled to have this before Your Honor. Now the question of course will be determined by Your Honor.

By the Court: What the court is thinking about is that in the event of appeal in this case, it would cast a great burden on either party who took the appeal to carry this up and place that burden on the appellate court.

By Mr. Stewart: To us, of course, we have had so many burdens, one more of carrying that record to another court is one that we wouldn't hesitate to undertake.

By the Court: I know, but the judge ought to consider very carefully the relevance of it before encumbering the court.

By Mr. Stewart: That is true, but the position of both sides of the matter in writing the brief can be very quickly summarized because it's more or less of a negative. Any one who is familiar with this record can see I am correct

with reference to my understanding of the facts. Now as to what those facts might mean is a legal proposition. Of course I am going to try to get Your Honor to agree with me that it means that the court had no jurisdiction in New York. If Your Honor decides that question with us, of course the Government would have to take it up. If you decide against us, of course we might have to take it up. But either way, of course we would need the record, either here as part of our proof, or part of our offer of proof, as I see it. The fact it is long is unfortunate of course, for everybody. It has already cost us a great deal of money. [fol. 253] Mr. Andrews just suggested that we are using it as an exhibit, that it wouldn't be necessary to keep it in the record, and then the Circuit Court of Appeals has the discretion in those matters, too, we could go before them and get leave not to reprint all of this.

By the Court: Is there objection to the evidence?

By Mr. Tysinger: May I reply, Your Honor?

Now, in the first place, about the briefs, this is the brief filed in the Supreme Court of the United States. Certiorari was denied after Judge Learned Hand handed down the decision, and one of the things was about the venue, whether the conspiracy was in Illinois or New York. It's in this brief where the Supreme Court had to pass on it. The first question—let me get to it, the question was not whether there was a fatal variance between the indictment and the proof with respect to venue and knowledge by the grand jury of the person referred to in the indictment. Then it goes on to comment there, but now what counsel, may it please the court, is asking to put this vast, voluminous record in this habeas corpus case in this court as a collateral attack, it is provided for under section 2255, it is in the New York jurisdiction. Your Honor is familiar with the new title 28 U. S. Code, he is making the ground now about the motion for relief which says a prisoner in custody under a sentence of the court of the United States claims the right to be released upon the ground sentence was imposed in violation of constitutional laws of the United States or that the court is without jurisdiction—(reads). I say they have not shown the Supreme Court brief which shows where the venue was. We say therefore they have not complied with this rule here. They have to go to the [fol. 254] sentencing jurisdiction under this motion, and

can not make it in a habeas corpus. That is the new law on September 1st, and that is after September 1st.

By Mr. Stewart: It doesn't go into effect until September 20th, and we filed our petition before it went into effect. I happen to be quite familiar with that, I mean a little more than if I had not been trying to get them and keep them from putting that in there. I think the intention of that rule is to require a person who claims that there is something wrong in his conviction, he is required under those rules to go back to the court where he was convicted and try to get relief there first. But our petition was filed before this rule went into effect, and it is doubtful in my mind if by rule making they can take away the fundamental right a person has.

By the Court: I have very serious doubt about the constitutionality of that provision myself.

By Mr. Stewart: I am glad to hear Your Honor say that.

By the Court: The Constitution itself decrees the right of writ of habeas corpus shall not be abridged.

By Mr. Stewart: That is my understanding.

By the Court: Of course I suppose the theory itself doesn't mean that they can't require certain proceedings precedent to the issuance of the writ.

By Mr. Tysinger: That's what it says in the final section of it, says that is a precedent to the issuing of the writ.

By the Court: I happen to be on the habeas corpus committee that works on these questions. I know what the [fol. 255] views of the committee were. I don't, have not reached a conclusion about the legality of that particular clause there.

By Mr. Tysinger: Well, I just, I am not relying on that particularly, Your Honor, but they, counsel in his, all the way through on direct appeal, has not brought this matter to the attention of the court.

By the Court: Let me see the decision on the appeal.

By Mr. Tysinger: All right, sir, it's nothing new but what Judge Hand didn't review in that record.

By the Court: Have you a copy of the pleadings, they in this case have not been read, I read them some time ago when the paper was first presented to me.

By Mr. Stewart: They are incorporated——

By the Court: Is there an allegation to the effect that the original sentence is invalid and that this petition is

based on that sentence, or is it just the warrant of arrest and the parole violator?

By Mr. Stewart: We have both points in our petition, Your Honor, and our petition has been printed since, Your Honor.

By the Court: Read the part of the petition which brings in the issue of the legality of the original sentence. Have you a printed copy of that?

By Mr. Stewart: Yes, Your Honor.

By the Clerk: I have one here.

By the Court: All right. Have you a copy of the sentence here?

[fol. 256] By Mr. Stewart: A copy of which?

By the Court: The indictment, I mean.

By Mr. Stewart: Why, Your Honor, that is in this record.

By the Court: Have you a copy of it attached to the petition?

By Mr. Stewart: No, Your Honor.

By the Court: Let me see that.

By Mr. Tysinger: I believe it is attached to the response.

By Mr. Stewart: We just attached the parole warrant to the petition, the judge is asking about the indictment.

By Mr. Tysinger: I know, but I think it is attached to my response.

By the Court: Well, I will allow you to introduce the indictment, the sentence, the verdict of the jury and the sentence of the court.

By Mr. Stewart: Of course that won't show our point, Your Honor. I mean it's like ruling there is nothing to our point.

By the Court: Well, I will rule that the question, the evidentiary question is finally determined in the trial court.

By Mr. Stewart: Well, in order to show our point, then, we would have to offer the rest for the purpose of appeal.

By the Court: I say I don't think it is relevant in a habeas corpus case.

[fol. 257] By Mr. Stewart: In order to make the record clear, if we do have to go up, I suppose it would be proper to have me show this as an offer of proof.

By the Court: Yes, the complete record was tendered by counsel for petitioner and upon objection the record was excluded from the evidence. Exception noted and allowed.

By Mr. Stewart: May I make a statement with reference to my efforts to get some further evidence? I dislike being a witness. We have a case at home which condemns that quite severely, but I don't know of any one else who knows the facts.

By the Court: Are they exclusively in your——

By Mr. Stewart: It appears they might be as far as any one in Atlanta is concerned. Now there are other people who know about it, but it was just an effort to get the depositions of Bioff and Brown. I think I ought to report as to Brown I gave the marshal in Chicago a subpoena, and the fees necessary to bring them into Judge Echol's court where a companion case was set for trial, and it was my intention when they appeared there to serve them with a subpoena to go before our notary public at the same time as these other depositions were being taken in Chicago. A lawyer who was formerly with the District Attorney in Chicago, Mr. Morris Walsh, appeared ahead of time and with a formal motion to quash the subpoenas and they were quashed. The ground for quashing them was that Bioff and Brown did not reside in Chicago, or within a hundred miles, and he was just attending there at a tax hearing and it was not proper for me to subpoena them. [fol. 258] So those subpoenas were quashed and I didn't have their address, and I was unable to obtain their testimony.

By the Court: That was in another proceeding, wasn't it? You have not undertaken to subpoena them in this case, take their depositions?

By Mr. Stewart: They reside more than a hundred miles from here and under the rule——

By the Court: I know, but you could have taken their depositions or interrogatories.

By Mr. Stewart: I couldn't get service on them because of what happened. I mean I don't know where they live, and I did get service on them to appear before a judge in our district.

By the Court: In this proceeding?

By Mr. Stewart: Well, a companion proceeding involving the other parolee, DeLucia, who is on bail in Chicago. That case is pending there and instead of them appearing, their lawyer came ahead of time and obtained the quash of my subpoenas.

By the Court: Was there anything else?

By the Clerk: These were identified, but not admitted.

By Mr. Andrews: Let them be admitted in the form they are in, then the reporter won't have to write it off, it would save that much writing.

By the Court: All right, admitted.

(Exhibits #1, 2, 3, 4, for plaintiff admitted in evidence.)

By Mr. Stewart: Your Honor, we have here the bound [fol. 259] volume, the investigation as to the manner in which the United States Board of Parole is operating and as to whether there is necessity for change in either the procedure or basic law. That is the title of the volume, that is, it is printed for the use of the committee on expenditures and the executive department. It contains a transcript of the testimony given before the Congressional Committees in these matters and it is supplemented by a little further material which is on file. We filed it in typewritten form, and we would like to have it considered as an exhibit with the petition, and the materiality of it is this: The petition alleges that the warrant in this case was issued arbitrarily and we are undertaking to demonstrate to Your Honor from these Congressional hearings before whom the parole board members, including Judge Rogers who issued the warrant, and we believe we can demonstrate that they had no evidence upon which to base a warrant, and they knew it, and they made answers to the questions indicating that.

By the Court: What—is this just a report of the testimony taken before a committee?

By Mr. Stewart: It's a transcript of the testimony.

By the Court: You may offer it as part of your brief, but it's not admissible in evidence.

By Mr. Tysinger: That's what I was fixing to say, Your Honor, I don't want it in the record.

By Mr. Stewart: Well, it's really a statement of facts.

By the Court: Well, you don't prove a fact that way, it's hearsay.

[fol. 260] By Mr. Stewart: Well you remember from the depositions which were read here, the question was whether or not these parole board members had been correctly reported and they said they have, and so it's a part of the deposition.

By the Court: Well, you can put those parts in as impeachment matter, if you wish.

By Mr. Stewart: Well it isn't really impeachment, it's a showing of facts.

By the Court: I assume it is what you said, your use to be made of it is more or less contradictory. If it is the same, there is no point in putting it in, if it's contradictory and it is admitted as impeachment.

By Mr. Stewart: No, it wouldn't either, those things, it's sort of a short cut to getting this testimony before Your Honor, which testimony was given previously before a Congressional Committee.

By the Court: That wouldn't be evidence in this case unless it is used as impeachment evidence.

By Mr. Stewart: Well, it's a matter of knowledge here. You don't have the same ruling of evidence concerning the matter before Your Honor on this as you would if somebody were suing somebody for some money, but I think I understand what Your Honor would like to have me do, if I can point out part of it that is before the court to that extent, that's all I want. I want to show you from their own lips where they gave testimony under oath that they had no evidence.

By the Court: Well, I say——

By Mr. Stewart: May I be permitted to do that? That [fol. 261] will serve the purpose and the District Attorney has a copy of that volume.

By Mr. Tysinger: I never have seen it until this morning.

By Mr. Stewart: Well, I gave Mr. Mundy that one I believe——

By Mr. Andrews: There has been one in the clerk's office, and in the district attorney's office since the deposition.

By the Court: These depositions you read, they state in those depositions that they did have evidence which would support the warrant?

By Mr. Stewart: They refused to answer that. They were also asked if they are correctly reported in this testimony given before the Congressional Committee, and they answered that, yes.

By the Court: And they testified that is correct.

By Mr. Stewart: Yes, they testified that is correct.

By the Court: You might read the part they say is correct.

By Mr. Stewart: That is all I want to do.

By the Court: You might read it into evidence.

By Mr. Stewart: Just those parts which they testified was the correct statement.

By Mr. Tysinger: Now respondent wants to make one objection now on this point. The fact that anybody connected with the parole board who testified before the Congressional Committee, it might not have had evidence at [fol. 262] that time, and it is not concluded that the parole board didn't have.

By the Court: That just goes to the weight of the evidence, as I understand it. Now they have testified that they testified before the committee in certain language, and that they say that language is correct, the language they used at the time.

By Mr. Tysinger: Yes.

By the Court: Virtually they are making it their testimony before this court.

By Mr. Tysinger: At that time. What my point is, it would not necessarily go to the impeachment or contradiction of the United States Board of Parole, a warrant issued on a later date, which we site upon reliable information furnished——

By the Court: I say that goes to the weight of the evidence.

By Mr. Tysinger: Yes.

By the Court: If they decline to say anything about it at all, it is a question of whether their original evidence doesn't continue into the present.

By Mr. Stewart: Your Honor, the testimony is rather lengthy, and if the court please, for the purpose now may I just state the substance of it, and then we can supply the specific copy of the very thing because I set it up for one thing in a printed traverse that I have where Judge Rogers said he had no evidence and here is, for instance this question on 708, Mr. Hardy is one of the Congressmen and he has Judge Monkiewicz on the stand, and has examined him quite thoroughly about the manner in which [fol. 263] the paroles were handled and issued, and Mr. Hardy says, "on the basis of what you know now, do you know of any basis on which the parole can be revoked, Mr. Monkiewicz." That is the real question. I think it is something that should be studied, and if you take along——

By the Court: I am limiting the evidence, not to expression of opinion about law or anything else, but what they

actually said with respect to whether or not they had any evidence before that, and what that evidence was.

By Mr. Stewart: Well, I believe this is a fair summary of their testimony, that they hadn't any evidence of any violation.

By the Court: Whose summary?

By Mr. Stewart: I say I am summarizing Judge Rogers' testimony.

By the Court: You had better get the actual language of what they actually said. You might mark it and then tender it in evidence.

By Mr. Stewart: All right, sir.

By the Court: How much more evidence have you, gentlemen?

By Mr. Stewart: I think I am about through with mine.

By the Court: All right. You might submit that a little later, Mr. Stewart, the part you intend to offer.

By Mr. Stewart: I think it would save time.

By the Court: My Tysinger, have you any evidence?

[fol. 264] By Mr. Tysinger: I want the record, if you have not already done it, I understand the indictment is offered and submitted. The indictment, the judgment and sentence.

By the Court: I stated it could be. I don't know whether it was actually tendered or not.

By Mr. Tysinger: That is the reason, if they have not tendered it I offer it myself.

By Mr. Stewart: We will be glad to offer it, go in as a part of our case. I offered a great deal and he took out part he said he would admit and that is in evidence.

By the Court: Let it be clearly understood the court is admitting the indictment in the original criminal case, verdict of the jury, and the sentence of the court.

By Mr. Tysinger: And we wish to offer the parole warrant.

By the Clerk: May I have those, please.

By Mr. Tysinger: It's attached to the response.

By the Clerk: The indictment, the verdict, and sentence, I don't have any of those.

By Mr. Stewart: The parole warrant is either attached, a photostatic copy——

By Mr. Tysinger: May I see the response? The judgment and commitment, the exhibits attached to the response that would be in evidence by the petitioner, is that right?

By Mr. Stewart: Yes.

(Above documents are petitioner's exhibit number 5.)

[fol. 265] By Mr. Tysinger: Now there is a record of employment, exhibit B, which is an analysis of the prison status, term, and everything we offer——

By Mr. Stewart: I see no objection.

By the Court: Now, wait a minute, before the respondent commences to introduce evidence, I think you had better get all your evidence in. Of course the burden is on you, and I have admitted for you——

By Mr. Tysinger: Here, you can tender any of this you want.

By the Court: You can tender the indictment, verdict and sentence if you wish.

By the Clerk: Does Your Honor want this record admitted?

By the Court: Is it all in one place?

By Mr. Stewart: All the things Your Honor indicated should be in evidence are in these five columns.

By the Court: Oh, I understand, the five——

By Mr. Stewart: All right, then of course we offer the rest, even the part Your Honor would not allow in, so the five volumes would cover everything I believe Mr. Tysinger wants.

By the Court: I am talking about now what would be actually in evidence in this case. I am excluding practically all that record.

By Mr. Tysinger: I can object to it, it's not certified, but here is the certified record, under seal.

By Mr. Stewart: Your record is certified? The judge is not excluding it on the ground it's not certified.

[fol. 266] By Mr. Tysinger: I offer as a separate and distinct exhibit——

By the Court: Wait a minute, Mr. Tysinger, I am waiting for the petitioner to finish his case.

By Mr. Tysinger: All right, sir.

By Mr. Stewart: All right, Your Honor.

By the Court: I think the petitioner, if he is attacking the indictment would have to put the indictment in and the verdict and sentence, if he desires, and also, if you are attacking the parole violator warrant, I think that would have to be in as part of your case.

By Mr. Stewart: I will put it in as part of our case,

and I will adopt the certified copy, or the photostatic copy which the Government puts in in response, including the endorsement to be found on it, so that's already in the file.

By Mr. Tysinger: That is all right.

By the Court: That includes those items, the indictment, the verdict. Well, the verdict is not there.

By Mr. Stewart: The verdict is shown in the record.

By Mr. Tysinger: The verdict is shown in these docket entries, the minute entries on the back of the indictment.

By the Court: Suppose you just take your record there and get the printed indictment and recite the page and I will just admit in evidence that particular page, or two pages, whatever it is, the same way with reference to the verdict and sentence.

[fol. 267] By Mr. Stewart: I ought to be able to do that very quickly, Your Honor, it is all indexed here, Your Honor, or supposed to be. The indictment is shown on page 4, 4 to 6 covers the indictment.

By the Court: All right, that is admitted in evidence, page 4 to 6.

By Mr. Stewart: Volume 1.

(Above referred to pages become Petitioner's Exhibit #6.)

By Mr. Stewart: The verdict is on page 3793.

(Verdict becomes Petitioner's Exhibit #7.)

By Mr. Stewart: The judgment and commitment to Louis Compagna on page 4062. (Previously identified as Pet. Ex. #5.) And judgment and commitment as to Charles Gioe on page 4030. Does that cover all the matters, Your Honor?

By the Court: What about the verdict, have you got the verdict in?

By Mr. Stewart: We have the verdict in.

By the Court: For both?

By Mr. Stewart: Yes, sir, it's all one verdict, I believe.

By the Court: All right, are there any documents with reference to the parole violator warrant?

By Mr. Stewart: The Government attached to their papers a photostatic copy which I will adopt. It is signed by Fred S. Rogers. Give us the next number——

(Photostatic copy of parole violator warrant, Pet. Ex. #8.)

[fol. 268] By Mr. Stewart: On that same, on number 9, the warrant against Charles Gioe front and back, including the endorsement, is offered as number 9.

By the Court: Does that show the service of it?

By Mr. Stewart: Yes, Your Honor, shows also it was received by the marshal in Chicago, when it was received by the marshal in Chicago.

By the Court: What about the warrant for Mr. Compagna?

By Mr. Stewart: We have that in the violator warrant, yes. And as to Louis Compagna, there is the referral, that is a sort of technical name the board uses, that's what the paper is entitled.

(Warrant for Charles Gioe marked as Petitioner's Exhibit #9.)

(Referral for Louis Compagna is marked as Petitioner's Exhibit #10.)

By Mr. Stewart: And the referral as to Charles Gioe is offered as Petitioner's Exhibit Number 11.

(Referral for Charles Gioe admitted in evidence as Petitioner's Exhibit #11.)

By Mr. Stewart: My friend wants to put in the parts he wants, this is off the record——

By the Court: Well, you can put it in. Is that all you wish to put in, Mr. Stewart?

By Mr. Stewart: Yes.

By the Court: Anything else, Mr. Tysinger?

By Mr. Tysinger: I just asked him if he wanted it in. [fol. 269] I want the minute entries and docket entries, that part of the judgment.

By the Court: No more discussion, gentlemen, address the court. Any objection?

By Mr. Stewart: No, Your Honor.

By the Court: Admitted. Anything else?

By Mr. Stewart: I am not going to object to anything he offers that has to do with the record.

By Mr. Tysinger: Photostatic copy of minute entries of the Southern District of New York attached to the Compagna response. That goes into the Gioe case as well, the same document.

(Photostatic copy of minute entries referred to marked Respondent's Exhibit #1.)

By the Court: Is that all?

By Mr. Stewart: That is all.

By the Court: Anything else?

By Mr. Stewart: That is all.

By the Court: Have you found the excerpts?

By Mr. Stewart: That will take me a little time.

By Mr. Tysinger: If I may have it——

By the Court: How much time you gentlemen wish for argument?

By Mr. Stewart: I would like to submit to the convenience of the court for argument. You want to commence now?

[fol. 270] By the Court: I will start now and finish in the morning.

By Mr. Stewart: Give me from now until 2 and I will tell you how much more we need.

By the Court: I believe it is understood that the excerpts from the testimony of the board, before the commissioner, I mean before the investigating committee may be tendered later before the argument is concluded, I mean.

By Mr. Tysinger: Yes.

By the Court: Leave the record open for that purpose until tomorrow morning.

By Mr. Tysinger: Only open for that purpose, for the purpose of tendering——

By the Court: Yes. All right, gentlemen, you prefer to start now or in the morning?

By Mr. Stewart: We will need some books, and I think we would be better off if we waited until morning before we started, Your Honor.

By Mr. Tysinger: I understand Your Honor wants about an hour to the side, we will take less, if that suits Your Honor, is that right, Mr. Stewart?

By Mr. Stewart: I am always guided by what the judge says.

By the Court: I don't want to limit the argument too much, if you think you will need more than that, I will consider it.

By Mr. Andrews: If we can take a clean copy of these [fol. 271] hearings and underline the testimony, it would save a tremendous typing job.

By the Court: Well, it is altogether, or skipping about?

By Mr. Andrews: It's scattered around through here, it's fairly well——

By the Court: Well, it might be well just to tear out the pages of any part that is wished to be quoted.

By Mr. Tysinger: That is better.

By the Court: It might include some other matter, but just mark that, leave unmarked the part that you wish to put in evidence. I wish you gentlemen would agree upon that definitely by in the morning. There's one other thing I would like to inquire about. Has either side the legislative history of this new act?

By Mr. Stewart: I have a volume of it, Your Honor.

By the Court: Have you?

By Mr. Stewart: Yes, Your Honor, and I also have a number of references to it in that original trial brief that I prepared for Chicago. I gave the prosecutor a copy, and Your Honor, I don't know if Your Honor, that makes reference to the legislative history and I have the bound volume——

By the Court: I am talking about the last clause which refers to the filing of the motion to review before the trial court.

By Mr. Stewart: Oh, that——

By the Court: Before applying to the habeas corpus [fol. 272] court. Now I understand your position is that your petition was filed before that, and it is immaterial, but if the legislative history is available, I would like to have it, because I followed that to the point of it going to the committee in Congress very carefully, and that clause was not in the original draft.

By Mr. Tysinger: I wish to differ with counsel about the effect. The petition was sworn to and filed in the clerk's office September 2nd, as I remembered this act it says it went into effect on September 1st. It says "effective September 1, 1948," and he filed his petition on September 2nd.

By Mr. Stewart: I will see if I can find that legislative history. I wrote a book on it, if I had thought to bring my own book, but I didn't think Your Honor would ask for it.

By the Court: I would like to see it because I am very much interested in it. You haven't the legislative history here,—have you got the legislative history here?

By Mr. Stewart: I would have to look around Mr. Andrews office, I don't have it here. When Your Honor first, I thought Your Honor meant the administrative procedure volume. I have that, the administrative history of, the legislative history of the administrative procedure act. We

have had a controversy between us here, I think as to whether that applies.

By the Court: We'll take up the argument in the morning, gentlemen.

(Whereupon court adjourned at 1:40 P. M.)

[fol. 273] Tuesday Morning, October 26, 1948.

(The hearing was resumed at 10 o'clock, and the following proceedings were had.)

By the Court: Proceed with the case on trial. How much time you gentlemen desire?

By Mr. Andrews: Your Honor, we would like to have an hour.

By Mr. Stewart: The prisoners are out here, Your Honor, would you like to wait a moment for them?

By the Court: Yes, bring them in. You may proceed, Mr. Stewart.

By Mr. Stewart: May it please Your Honor, and gentlemen representing the Government, I think I might say at the outset that Your Honor is most likely a court of last resort for us here. If Your Honor decides against us, and just sends these men back to the prison, why I would advise them not to try to appeal. We have enough cases now, and more than enough in the Circuit Courts of Appeals, here and there, and by the time we got up our record, why most likely the picture would change, the situation would change. If Your Honor sends these men back to the penitentiary, I say, as a lawyer, and I would say to these folks here, I would have a difficult time reversing Your Honor because of the large amount of discretion the court has in these matters, and possibly I should not say this, it's against my side of the case, but I have to face the bad as well as the good as we go along. It would be a very simple matter for the Circuit Court of Appeals to just more or less dismiss us by saying that Judge Underwood heard the evidence and it [fol. 274] resulted in, it developed in the trial that the hearing from the parole board, the result had not come down yet, and you are a little bit premature in view of the fact that Judge Underwood has so indicated by his decision, and we are not going to interfere with it, because it would probably be a bad precedent to have these prisoners come

in and having a court hearing before having a hearing before the board. Those are questions of course that have been litigated over and over again. As I said before, Your Honor, there are many cases which are bad for petitioners, that is not the fault of anybody. It's the fault mostly of the situation the petitioners find themselves in. Your Honor, sitting here in a district where there are thousands of federal prisoners, knows very well, of course, it's human nature, they desire to get out, and when I came over here to wait upon Your Honor with reference to a motion in this case, Your Honor was hearing some of these prisoners, and I am not without experience in that line myself. I receive a large amount of mail, I can't even handle it, I am not staffed and some times I feel badly about it, because I would rather be in a position to write to these prisoners and explain the law where the law might be against them. But anyhow, it does create a problem for everybody, and we have to take cognizance of it here, because we know we face a court which has a great deal of experience in habeas corpus matters that is to our advantage. I don't think we need talk about fundamentals with reference to habeas corpus in these matters but Your Honor can't help but have an experience which of course to some would be rather tedious, and that is listening to people who come over here after they have prepared their own petitions, after they have read some of the Supreme Court decisions, and Your Honor can't escape the feeling that in their desperation they are [fol. 275] trying to make the facts in their case fit some United States Court decision, where as a matter of fact, the facts wouldn't fit into that, and to put it shortly, they are just telling Your Honor some falsehoods, trying to get out. And Your Honor hears those falsehoods day after day and month after month and year after year, you would have to be something more than human to approach one of these cases with the thought that they are here with a case that is different from the general run of cases, and it is a little difficult for any lawyer to stand before a court and to insinuate error, to come right out and say that officials connected with the government had been guilty of misconduct. But of course that's why we are here. If this matter had been conducted properly from the start, we wouldn't be here, and I am not going to try to condemn anybody in particular, and I feel Your Honor of course is familiar with

that sort of wisdom that is found in the Bible, let he that is without sin cast the first stone. And I often, before I condemn, I—some public official, I often try to understand the situation he finds himself in, and unfortunately these prisoners find themselves in a situation which has been created by a combination of things that are much bigger than they are and much beyond their control. This matter is so big, Your Honor, it has engulfed the Attorney General of the United States, the President of the United States. That sounds a little bit fantastic, but it is based on the record. This origin of this case, Your Honor, is an effort on the part of certain Republican Congressmen running for office, not only for the offices they hold to which they would like to be reelected, but some of them have ambition to be mayor of Chicago, and we have a situation in Chicago, I won't take much time with that, but it is necessary for Your [fol. 276] Honor to know a little bit about the background. I can't stand before Your Honor and say this warrant was issued arbitrarily and without any evidence. I have said that, and the petitioners have sworn to it, and I could say it over and over again, and I would run into doubts the judge might have, and say, well, that is the petitioner here trying to get out, and now I am listening to the petitioner's lawyer and these lawyers know they have to claim something like that, but I have to go further, I have to tell Your Honor a few little circumstances, show by this record——

By the Court: By the way, pardon me, have you got that record ready?

By Mr. Stewart: Yes, Your Honor, and here is the situation. I will give Mr. Tysinger one copy, and hand a copy to Your Honor, I had done the work Your Honor had anticipated or asked for, yesterday, that is in another case, companion to this case in Chicago before Judge Igoe. I wouldn't offer it here, we had it here yesterday, and set out in the printed version the portions I believe support my position that this warrant was issued without any evidence as to the knowledge of the people who issued the warrant in Chicago. It is shown by their testimony.

By the Court: Is there any objection to this, gentlemen? We want to complete the record?

By Mr. Tysinger: No objection.

By the Court: Admitted.

(Portions of printed record referred to marked as Petitioner's Exhibit #12 and admitted in evidence.)

By Mr. Stewart: Ordinarily, as Your Honor knows, a parole is given in the discretion of the Parole Board, and [fol. 277] there is a sincere effort on those members, they area of course worked pretty hard, but they are substantial citizens and they are chosen because of their integrity and because of their experience in that sort of work, and they are working in a field which calls for a great deal of hard work, and calls for the sort of judgment where you and I know of course from our experience with these criminal cases they can be right in thousands of cases trying to help somebody, and they get hold of one case that goes wrong, the man is on parole, goes out and shoots a policeman or somebody, and—and that brings in a condemnation of the whole system, brings in condemnation of people who voted for the parole. Your Honor is familiar with all that. Well, here the same situation arises with just a little different twist to it. These men went to the penitentiary, and they were tried in New York, and they were convicted and sentenced, and they served a third of their time, and they were eligible for parole. They applied for parole. And if I could include in my argument some of their thoughts and include some of the things they have said to me, you can picture yourself, Your Honor, with imagination, if you were in their position, they would have been much better off if they had never received any parole because if they had stayed there automatically with their good time, their good prison record, or they would not have been allowed parole, they had earned a certain amount of good time. Now if they have really violated it, of course it is only proper and just they should lose that good time. But they are going to lose it now, if this is really a violation, and they would have been better off if they had just stayed there and not accepted any parole, or not applied for any parole. And I think I can speak for them, Your Honor, when I say that if they had known when they filled out their blanks, [fol. 278] application blanks, that instead of a parole, they were going to be out and be hounded by the FBI at the back door and front door, and tapping their telephones, and going around and seeing their associates and friends, and cross examining everybody running for political office over their parole, they probably would never have accepted it.

But unfortunately after they got out on parole and tried to live the kind of life they knew they had to live, they are not children any more, you are dealing with grown men who have made some success, and they would know something, they have families and the parole members who are experts on these matters had records which Your Honor has before you, the parole members were examined and cross examined by this Congressional Committee people, and they said these men made good parole risks, we knew they would make good parole risks and they have made good parole risks. They have not violated their parole, and the Congressmen answered that by saying, well, they were too smart for that. Well, if a man gets out on parole and lives a life, a clean life with his family and does not violate his parole, is he to be condemned by somebody saying he was too smart to violate it? What is the difference whether a man obeys the law because he thinks that is the smart thing to do, or because he thinks it is the right thing to do? As far as the law is concerned, he is obeying the law.

Now here is the situation, and they are in the record, Your Honor, we have a newspaper in Chicago that tries to influence the entire community, let the officials run the foreign policy of the government, and everything else, and it is probably a powerful friend, and it is a very dangerous enemy, and that is the Chicago Tribune. And one of their reporters has been assigned to this case, and he has something in the paper every day about it. If he can't find any-[fol. 279] thing new, he writes the same story over again, if it is mild or from the bottom or from the top, every time he runs out of something to make it sensational, he quotes one of the Congressmen, probably without even talking to them. They condemn everybody that tries to follow the law. They condemn everybody that would be inclined to give these men any sort of a hearing, and I might say at this point in the argument, we feel grateful we have received a hearing. This is the first chance they have had, a chance to tell anybody connected with any court that they had not violated any parole, and they have lived good lives as good citizens. Now that is what they have done. I am sorry we don't have it all here. We don't have everything here, all those F. B. I. reports and all the things that the parole board has in their file. We don't have them here, but I can tell you the substance of what all that might show, be-

cause the parole people were under oath and were cross examined by the Congressional Committee and they said under oath they had nothing against these men, and that was said during March, April, May, June, July, when they were running all these hearings just before the warrant was issued.

And of course they are caught in between these powerful forces and just to show Your Honor an illustration, and I will pass to something else for a moment. This powerful influence which is putting these people in the penitentiary and keeping them there, it is so powerful it reaches out. An effort was made to smear the Attorney General of the United States, and try to make it look like the President of the United States is unfit for his office. It sounds a little fantastic, but this is the way it was done. The Chicago Tribune and this particular newspaper reporter, to hear how the thing started, he went to the Parole Board people, [fol. 280] and he wanted to see the records. He wanted to see who the sponsors were, who the people were who had asked for parole in this case. Of course you know newspapers that do that sort of campaigning, they don't do it to fail. It only turned out in the investigation his personal friends was mixed up in the thing, and he happened to be a Republican, and so he lost the job because of it. But the investigation was made, the parole board would not allow Doherty to look at the files, and Doherty said, I will get those files, we will have a Congressional hearing, and they make you give them up. So lo and behold, members of Congress friendly to them, and of course Your Honor is familiar with the conditions that exist in the country, and Your Honor must take judicial notice an election was coming on, Your Honor must take judicial notice we have a Democratic executive department. So there was an effort by the Chicago Tribune, and the Republican Congressmen to smear everybody, and here is how far they go. One Congressman kept blasting off in the paper, wait until he got hold of Tom Clark before the Congressional Committee, they are going to make him toe the mark, and make him explain all this and that. And finally, Mr. Clark went over before the Committee, and that very Congressman who was crying for him left, and just wasn't available. They got him on the phone, and he said he was busy, and they went ahead with the examination of Mr.

Clark after waiting half an hour or so. And then the same Congressman issued a statement to the paper that Clark sneaked in and went before the Committee when he wasn't there.

Now what I am telling you now is in the Congressional report, because the report is not unanimous—there were some Democrats on that committee, and in the final report [fol. 281] to Congress it was stated there that the whole thing is a smear campaign, and you see the position it leaves us in. When I say "us" I mean the prisoner and me. How can I go to the Department of Justice and the members of the Parole Board and expect them to consider the matter dispassionately according to the law. It's only natural they would be afraid of being accused of collaborating and conspiring with me. Everybody who touches the case is accused of some sort of misconduct. Of course it is easy to accuse in the press, Your Honor knows that that is a campaign of villification.

Here is the situation, this record shows that the F. B. I. has watched these men, both members testified, Your Honor, and you have it, and I have set it out in black type in the pamphlet I just handed to Your Honor, he said, "we know nothing against these men, they have not violated, and we have had them watched closely by the F. B. I. and we have no complaint and we know these men could not violate the law without us knowing it, because it's harder for a man on parole to get by with any violation of the law than it is for a man not on parole." Now that is the testimony, and at first they started out before this Congressional Committee, and the Board, being honest, decent men, probably resenting this sort of charge, and they were put on the public stake and cross examined as to why the parole was issued. And they dug up the fact that a lawyer by the name of Dillon in St. Louis, and it happens that Mr. Dillon handled some campaign when Truman who is now the President of the United States, ran for Congress, or something, some campaign way back in the beginning, and it happened that Mr. Dillon and the President of the United States are friends, just like anybody from Missouri is more or less a friend of the president. And when Mr. [fol. 282] Dillon is on business in Washington he is welcome to go over to the White House. The Congressman makes a lot of that because here is Mr. Dillon's connection with the case. He is a lawyer practicing in St. Louis——

By the Court: Are these facts in this——

By Mr. Stewart: They are all in this Congressional record, Your Honor.

By the Court: I mean in the record before the court.

By Mr. Stewart: Yes, Your Honor. Yes, Your Honor, and as I said, I will just briefly dispose of Dillon. He originally represented a man by the name of Buck in that case in the Circuit Court of Appeals, and it arose out of the same moving picture——

By Mr. Gottshall: If Your Honor please, I don't believe the facts which he is now relating appear in the record for the case, or the formal pleadings, or exhibits, do they?

By Mr. Stewart: The connection of Dillon with the case is in the Congressional hearing I filed as an exhibit with this petition.

By Mr. Gottshall: Is it all in there?

By Mr. Stewart: Yes. I should not think the representative of the Department of Justice would have the slightest objection to my pointing out the manner in which they just took a very natural innocent act on the part of a lawyer who went to Washington on other business and went to this Parole Board, and he was familiar with another branch of this case. Anyhow, because of representing another client, and he called the attention of the [fol. 283] Parole Board, among other things, to the fact that the men who were the principal witnesses for the Government were not worthy of belief, wouldn't believe them, and it was developed that when Judge Bright, who sentenced these men to ten years found out that these accomplices who had turned evidence by the Government,—and by the way, said they didn't expect anything for it, but just as soon as the conviction of these men was had, they received their reward, and they were given their liberty on probation. The understanding Judge Bright had was that those people were to do ten years, and he had given these people ten years, and Judge Bright thought that was an injustice, and he said so to Mr. Bernstein who happened to be a lawyer who was then trying to intercede for one of the other defendants who is now sick in the hospital. And they obtained a letter from Judge Bright which sort of softened up the original letter which was written. The parole board did all these things, and the sum and substance of it was the parole board used their judgment, and they thought it was a good case for parole, and if this Con-

gressional Committee had not come along, these men would still be on parole. And unfortunately, Your Honor, the head of the parole board, Mr. Webber, was sick at the time this investigation started. Why the Tribune insinuated that he was malingering, the man was not really sick, he was running out under fire, he couldn't face this examination. And then he went ahead and died and proved he was really sick. So that man died. He was head of the parole board, and he was one that approved of this parole. Then Daniel Lyons, he heard Lyons testifying, heard some one say he was known to some of you gentlemen, maybe including Your Honor—if I could point to a more upright citizen who knew his business about appearing as a lawyer [fol. 284] —He told the members of the Congressional Committee, Your Honor, that is in this record and I have marked it out for Your Honor to read, that these men have a vested right in justice to their parole until they do something to forfeit it, and that there is nothing wrong about the issuance of the parole.

By the Court: I didn't want to interfere with any line of argument you desire to make, but the Court is concerned about the legal phases of the case, and in the first place, as I understand it, in this petition for writ of habeas corpus you are claiming that the original sentence was invalid and the court didn't have jurisdiction, habeas corpus would lie. That part of the case is simple.

By Mr. Stewart: That is, Your Honor—pardon——

By the Court: Now you come to the other phases set out in your petition, they must be looked at in the light of the fact that a habeas corpus proceeding only goes to the question of whether or not the petitioner is entitled to his discharge at the present. Now I would like to hear you on that. All of those things may be true, and still the petitioner might not be entitled to discharge at this time. This may not be a proper procedure to raise those questions in, and there might be an adequate provision of law to determine these questions in the nature of a declaratory judgment, for examine, or injunction or mandamus, or something of that kind. But I would like to have you address yourself, if you will, to the question of the right sort of a court to go into these questions, or grant liberty at this time in habeas corpus proceedings, not what might be done in a different kind of proceeding.

By Mr. Stewart: I appreciate Your Honor giving me

the benefit of what you would like me to address myself [fol. 285] to, and I will do that. The attack on the judgment in New York, I stated in my printed brief that I had to put this in the petition because I have already put it in other petitions, and if I didn't put it in here, why later on I might be accused of having abandoned it. I can't afford to do that, to take that chance, and I thought Your Honor indicated quite clearly yesterday, when you would not allow me to put in the evidence which would support that charge, Your Honor practically indicated you didn't think there was a great deal to the point, so I didn't think I ought to spend a great deal of time on that, Your Honor more or less indicated that.

Now, the other problems, I recognize them, of course, I have done nothing but read cases, I think I have read every case there is connected with it, of the parole board, and I know this, that if I were here just on an ordinary parole violator case, and the parole board used its best judgment and exercised its discretion, even if it turned out later it was mistaken as to the facts, that's one situation, but where the parole board proceeds arbitrarily and just uses the warrant without any evidence, of course you are in a different category. That is the reason why I thought those details were important.

By the Court: How does the court know the parole board has done that, or will do that, until the final decision is rendered.

By Mr. Stewart: That is a very good question, because the judgment that has passed, and what is going on, you can tell the nature of the conduct, and when I get down, and I am doing it now at Your Honor's invitation, the reason you don't have everybody here before Your Honor is that when we asked the parole board members questions [fol. 286] in Washington, and Mr. Gottshall is here, I had an idea he had a hand in preparing the answers because he is representative of the Department of Justice, he is familiar with their case.

Your Honor will remember the depositions were read here, and these members of the parole board were asked in substance, what evidence do you have against these men that they violated their parole, and they said, they refused to answer that on the ground it concerned a matter pending before their board. Well, Your Honor knows that is not a good objection. Suppose you had a member of the

parole board here on the stand and I asked him, I said, what evidence have you to make you think to start with you should have issued a warrant. The statute says you must have some reliable evidence. Now tell me what it is. Would Your Honor allow them to say, "I refuse to tell you that"? If Your Honor follows the law as I understand it, you would put them in jail, if they wouldn't answer, because there no such right as that is given to a member of a board to say when he is asked with reference to a court proceeding in preparing for trial, by the attorney for the petitioner to tell something about the facts in the case, he can't hide behind something like that.

By the Court: No, but if contempt proceedings were brought, the court could pass on that question.

By Mr. Stewart: I have no intention of bringing any contempt proceedings.

By the Court: The point I have in mind now is whether or not this court has any right to investigate that situation. Suppose the court did think that the board was wrong, in undertaking to not give what you call a constitutional hearing to these people, not telling them what they are [fol. 287] charged with, and declining even now to say what chances they have of violation of their parole. Suppose all that is assumed by the court. Then what would the court do? I couldn't discharge the men from the penitentiary.

By Mr. Stewart: Well, you have precedents——

By the Court: In a proceeding the court might criticize a declaratory judgment, or motion to review or something of that kind, but I am only concerned with matters which would entitle these petitioners to discharge now.

By Mr. Stewart: Well, going back to Your Honor's question, there are cases, there are precedents. Fleming versus Tate is one, where a similar situation arose, and Your Honor is familiar with the case. We talked about it before. 156 Federal Second, it is cited in my brief. Very briefly in that case the man who was on parole left the limits of where he resided to go somewhere to a funeral or something, and he was accused of violation on the ground he left without permission, and he claimed he had not left without permission, and he wanted to take his counsel who knew something about the facts, and also his lawyer, and he wanted to take his employer before the board, at this hearing, and the board wouldn't allow him to do that. It

didn't wait for a hearing. He went into court and filed his writ of habeas corpus because he said, "I am not going to get my hearing over there, this is not according to the statute," and the trial judge in that case wrote an opinion which the Circuit Court of Appeals said was a very careful and well considered opinion, the Circuit Court of Appeals endorsed it. Now they wound up that case by saying that he had a right to a proper hearing, and they weren't going to do anything to interfere with the proper conduct of the [fol. 288] parole board's business. But they went ahead and told them they would just hold the man for whatever he was, we don't get all the details from the opinion, assuming the man was on bail, if he was on bail or if he was over waiting for his hearing, the Circuit Court of Appeals after the trial court did it, practically said, now we are going to hold this case and have you go ahead and do the parole. And Mr. Andrews just reminds me the actual language of the opinion, the trial judge discharged him without prejudice to this preceding parole.

Now these rules state in general matters of jurisdiction in habeas corpus, Your Honor knows the court has considerable power about not letting the people absolutely—if we were before Your Honor on some sort of murder charge, and it was charged or claimed that the warrant wasn't issued in the name of the people in the proper manner, it didn't have the proper seal on them, and Your Honor saw from the evidence it was more or less a technical objection, and the defendant was entitled to this discharge, the law provides a method Your Honor, it can hold them even with a bench warrant if it is necessary, I mean for a proper charge, I mean with that sort of situation, as I see it, and all during the case you see I have endeavored, as counsel for these men, I have endeavored to get the parole board to follow what I believe to be due process, and one thing about the whole matter is this: that they don't make any mistake, I mean they don't make anything ambiguous about their stand, and they don't evade the question. They just said I am not entitled to the things I ask for. Now if they can tell me I am not entitled to it, and that is the end of it, where do the courts come in? That answers your question. These answer it, Your Honor, when you have somebody administering the law, and this is all they are [fol. 289] doing, just administering the law, the judgment after all is the judgment of the court in New York.

By the Court: Suppose they don't revoke the parole.

By Mr. Stewart: Well, that has been said in argument in Chicago, and they lead us possibly to hope that may be the final result. But meanwhile they have no right to keep these people over here as prisoners.

By the Court: Now that is a question I would like to hear you on. The statute provides that when the parole violator warrant is issued upon information, that the prisoner will be returned to the institution, and there held until the board hears him. Now assume that the parole violator warrant was legal and proper, they were properly returned to the penitentiary. Now there the law realizes how much the board has to do, how many cases they have to hear, and they don't limit the time in which they are to render a decision. I think that would be held, the court would hold it must be a reasonable time, they couldn't indefinitely postpone it without any reason, but they have given a reasonable time to reach a decision on that question, and I can't see that a court will presume that that decision would be adverse, especially in view of what you have said the evidence is in this case.

By Mr. Stewart: Well, would Your Honor even believe, I mean, I haven't the slightest doubt that Your Honor would ask me, is that in the record, if I told you, and I think there is enough in the record to show the facts of the matter, that this board and the group acting, I don't know just which individual does it, but they issued this warrant and sent it to the marshal in Chicago, and it shows [fol. 290] the time stamp on the back of it, and they had this during the morning of the day before, and they knew that these men were available by just a phone call, fifteen minutes and they would come on down and accept service of whatever might be there. But they don't do that. Now, Judge, I see the importance of this, and if I can't make Your Honor see it, of course it is my fault.

By the Court: I see the importance of it, too, I think it is a very important case.

By Mr. Stewart: All right, now here is what they did. The first warrant was issued, and I went in and filed a petition before Judge Igoe, and Judge Igoe said, these men are entitled to a hearing under the petition for habeas corpus, and he admitted the co-defendant on bail. Then the newspapers came out and condemned everything, you know in the way they do, he called it a convenient writ of

habeas corpus, and they reviewed the record of the judge, and he had formerly been in politics, a member of the Legislature, and all that sort of thing, and they quoted somebody connected with the prosecution, and these Congressmen as saying that the arrest was not handled right, because if it had been handled right, there wouldn't have been any writ of habeas corpus in the District, Chicago District, those officials and that marshal should have gone and taken that man DeLucia right over to a train or a plane and got him out of the jurisdiction. That was the accusation that was made, and lo and behold, a little later that is just the way they did it. They waited, they knew these men had lawyers, the men's names were in the original petition, because I expected everybody to be arrested at once, I was following the Congressional hearing, I was attending them, and the members of the board of parole promised the Con- [fol. 291] gressmen that they would take action, and that action looked like it would be a warrant, and I had the petition filed with the name of these men, and filed in Judge Igoe's court, and I expected all to be arrested, and I found out only one had been. And I asked the court to instruct the marshal that at any time they had a warrant they come in and join with this matter. Well, the court didn't feel he could do that. Then they went over to the home of this man, his wife sick in the hospital, his child there alone, with a crowd of them at 5 o'clock in the morning, took him out of his bed, wouldn't let him communicate with anybody, and took him over and put him on a train and got him down to Atlanta. Now that is an arbitrary action, an arbitrary use of a warrant which they filled in, and they had no evidence on which to base their action. That is the kind of arbitrary action the court should stop.

By the Court: Now, as I understand it, the Board claim that there were deceptions, concealment on the part of the petitioners. The Board claims not only violations of the parole subsequent to the parole, but they claim that there was deceptions, concealment on the part of the petitioners.

By Mr. Stewart: I am glad Your Honor asked that. It just shows if I seem to take some time, how many ramifications this case can have. I would feel sorry for some lawyer who would try to familiarize himself with all the language of the case.

By Mr. Gottshall: I interpose to make this remark: Mr. Stewart has a letter from the parole board dated August 6th, 1948.

By Mr. Stewart: I was going to tell the judge about it. [fol. 292] By Mr. Gottshall: You were going into that, too?

By Mr. Stewart: Yes, I was going to tell him about that. I was going to lead up to it, Your Honor. When I was writing to the board asking them to let me know what the charges were, and let me meet them, and give me some indication of what it was, and I put the paragraphs, that specific information, the letter is here in the deposition from Dr. Killinger, chairman of the board wrote back in substance, you can have our assurance we wouldn't make any charges against these men that the paroles were not properly issued. Now that is out of the case. And the reason it was in the case, Your Honor, was that the Congressional Committee and the Tribune and these Republicans started out by trying to make the Democrats look bad by making them admit themselves they should never have been given the parole. But they wouldn't admit that, and there was nothing on which that could be based, and the only thing that could possibly be gotten out of the files after everybody goes off over it with a fine-tooth comb, is this, Your Honor: These men had trouble with the law, became arrested on what they call general principles, they were just picked up, there was no charge. A little bit later they are letting them gain some time in order to accomplish it, they were taken into court, and that is the practice in Chicago. You may or not know it, but with a long list of arrests, it is possible for a person to overlook one or two of those, and Charlie Gioe had no previous conviction, Louis had one way back when he was eighteen years of age, and they knew all about that. He told about that. He told about a number of his arrests, and the Congressional Committee with the help of the police department and all these people investigating for the newspaper, and so forth, trying their best to find [fol. 293] something where there would be a discrepancy between the application for parole and the actual police record. Well, the only possible discrepancy they could find would be an arrest or two that wasn't on the application for parole. And that was explained by the parole members to the Congressional Committee. They said, we weren't

deceived, we knew who these men were, we knew their background, we knew their convictions, we knew they had been arrested a number of times, and if you have a man that has been arrested fifteen times and dig in the records and find it is actually twenty, and if they are arrested and he is out of the state, we still know who they were, and can understand how you might have left it off.

By the Court: Do I understand the Government in this case is taking the position that no violation of the parole is charged except for what took place subsequent to the probation, I mean to the parole?

By Mr. Gottshall: Subsequent to the release and parole, that is correct, and that is fully covered in the letter which Mr. Stewart mentioned a moment ago, August 6, '48, from Dr. Killinger. There Mr. Stewart is given assurance by the board in writing, that any action looking toward revocation of parole will be based, not on what happened prior to the release on parole, but subsequent to it.

By the Court: I can't conceive why there should be such great secrecy in what the Government claims the violation is.

By Mr. Stewart: Because they have no evidence, and they don't want to admit that. That is the answer.

By Mr. Gottshall: I would like to answer that a little bit later, if Your Honor——

[fol. 294] By the Court: All right, go ahead, excuse me, Mr. Stewart.

By Mr. Stewart: I think that is a very good question, and I rather like my answer. They don't tell us what it is, because they haven't anything, and then they desperately search around for something and they have nothing and can't answer. The fact is these men have not done anything that is bad enough, but they are trying to do what might be a political expedient, they don't want to come in and adopt something developed by the Congressman, they don't want to develop something the Tribune has done, because that might show the Tribune was right. So they have to run around and find something all by themselves, and have not found it. But here is how they tried. Eleven months or more ago, I don't know just how long ago the parole was granted, these men left the institution in Kansas and Your Honor knows they are required under the parole agreement to report practically immediately to the office

in Chicago. Arrangements had been made to do that. They knew they were expected, and if you know anything at all, you know that they weren't violating the parole when they walked out the gates and went over and took an airplane. It happens that the lawyer was handling some tax matter for them. He went down and hired a car, we don't know who drove the car, you can hire a car and driver, and these men didn't know who might be in the car as driver, one of them did know who the lawyer was. They got in the car, went over to the airplane station, to the airplane, and come back. Now that is the facts, but the F. B. I. goes and questions the stewardess, shows a lot of pictures of people they had taken out of the rogue's gallery, trying to prove that there was somebody else in that group coming [fol. 295] back. And even if there were, how could that be the kind of associates that is a violation of parole? I mean it is rather ridiculous, and it happened the day they stepped out of the gate, and it was known to the people connected with the F. B. I. immediately after, Mr. Compagna testified here that shortly afterward they were around questioning his friends. So they knew about that all the time, and with this knowledge, Your Honor, and knowing that had happened, whatever it was, and knowing all about it, under oath before the Congressional Committee they say, "We don't know a thing these men have done to violate the parole, and we have had them watched. Now where can a person in prison bring evidence that you can't get away from? And on top of that, when I sent the printed questionnaire down to Washington, I said, "What evidence do you have against these men?" They said, "We won't tell you."

Now, where is the burden of proof, and who has established the right to discharge, or if there is not a right to discharge. And I quote from the record with reference to the mechanics of the situation Your Honor is in. This just happened to be in the record, the Congressional Record: "Do you know why they were in a federal penitentiary?" The judge sat and heard a case, and the parole board was too busy to go down and take care of it. The District Attorney was probably trying to uphold the action of the parole board, and it appeared there was no violation, and the judge isn't asked, where are the members of the parole board. "Well, they are not here, Your Honor."

"Well, you send word to them if they don't get here and justify this action, I am going to turn this fellow loose." I am just using the language Judge Rogers used. That is the way the judge can control the situation. That is the [fol. 296] purpose of the writ of habeas corpus, to inquire into those things.

Allow me to step out of this particular case for a moment on the proposition of law involved to give an illustration which seems to me to illustrate our right to the writ of habeas corpus here. I was reading a large volume of cases involving administrative bodies, and Your Honor is probably more familiar with them than I am. But there is a great deal of law with reference to the immigration authorities. Your Honor knows that. And there are various classes a person can be in, and he can be deported, and that administrative hearing, ordinarily you have to wait while they go all through these things, and some times a person has to wait in custody on Ellis Island, or some port of entry. All right, suppose a case is like this: I have been to Cuba on a holiday. I am on the way back on a boat, and they stop me and lock me up, and I protest, I say, what is this for? And they tell me I am not a citizen of the United States. Well, it happens I was born here. I don't see how they can question that, but they say they do, if I will just wait they will give me a trial and show it at the hearing. Well, you don't think you have to wait there while they fuss around with their hearing, do you? I file a writ of habeas corpus, and this case is in the books, this man doesn't belong in that status. He doesn't need to wait while you go ahead with the rest of your administrative proceedings, and that is our situation here. In the ordinary course of their work, under the statute where they think they have some reliable evidence, they are entitled to issue a warrant on a man in custody, but if they use that warrant against the person that was not on parole, for instance, what would you say they do? Wait to see if the parole board could see if he was a prisoner, or had been [fol. 297] previously convicted? Your Honor would discharge him, because he didn't belong in the class they are trying to put him in. And that's our situation here. These men have not violated their parole, and I understand from what I heard around here, and of course I wouldn't be human if I didn't hear something, but Your Honor, you are fair, you are patient, in going into their cases——

By the Court: I don't think we need to go into that.

By Mr. Stewart: All right, but it is important to me though, because I want to recommend Your Honor, if you have read Fleming versus Tate, if you have any interest, if anybody has an interest in the parole system, they should be careful not to let things like that happen. In that case the judge takes the trouble to say nothing would do the parole system greater harm than to have these men in the penitentiary, he believed they wouldn't have a fair hearing if they are charged with violating their parole. Now what sort of morale are you building up here? What sort of case do you have if the end justifies the means. Then of course there is no use talking in any court, if I have to talk to the F. B. I. or any police agency there's no use talking because they get into a certain frame of mind. Your Honor knows that they feel anything they do, if they want a certain result, they do it in the way to bring the result in, they shoot somebody, they take people out of beds with a warrant that is no good, and get them out of the jurisdiction and bring them here. And Your Honor, before the Chicago court, when I complained about that, and Compagna—the District Attorney stepped up and said, we don't want to interfere with the administrative procedure, the board is meeting, we don't want to incur the displeasure of the board, [fol. 298] if we do, it may be some time before there is another one here. Well, there was no meeting here. We waited. We didn't come right down the day they landed in this penitentiary. We waited a while. I think we waited a reasonable length of time when they have no evidence. And then what happened? We filed a writ, and I had, if you want to call it threats, a lawyer has a right to write the board and tell them he contemplates it, if they don't give him his right. So I was talking to the court. They talked about the court at the Congressional hearing. Of course they knew there would be a writ eventually. Then what happened? They come down here and they have got two members of the board. That's two out of three, that's all they need. And those are members of the board, what is there to wait for. When they find out they have no evidence, they talk to the defendant, and they still have no evidence. They take that back to Washington. And what do they say in the depositions? We will give you a decision when we get around to it. We are pretty busy. That isn't

law, and that isn't justice, and that is an unreasonable delay, and this hearing of course was not a proper hearing. Your Honor used this illustration, to take a person in one door and out another. In Fleming versus Tate the statute says he shall have an opportunity to appear before the board. That doesn't just mean his physical appearance. What good would that do anybody? That means he should be given a hearing, given an opportunity to present his side, and that includes counsel, that includes the right to witnesses. So what are we waiting for in the administrative proceeding? We are waiting for them to do something that is illegal anyhow. And after they get through, we come in afterward and say, we waited, and this is what they gave us. We know what they are going to give [fol. 299] us. We knew in advance. I might compare that, you had so many of these cases involving draft dodging, the courts got so confused, Your Honor will remember. First they were of the opinion the men who got in trouble with the military authorities had to go all the way there, get himself in the camp, and then be charged with being a deserter by refusing to join in the army before he had a right to habeas corpus. Even the Supreme Court of the United States said that was the rule in the Falbo case. Well, they saw the injustice of it. The Supreme Court of the United States doesn't just blindly stick to some principle. They look for justice. And we are asking Your Honor to look for justice based on these facts, not on some other case. And in this case Judge Murphy said, we don't have to wait longer, don't talk to us about what this prisoner might have done. He is here now, and he is restrained of his liberty. And they said the court doesn't have to march up hill when they know they are going to have to march down again. No court need to wait while the administrative body fools around when you can see now it is illegal and unjust. That is the situation. I could go on forever, Judge. If I have evidenced feeling, I can't help it.

By the Court: All right, I will hear from the other side.

By Mr. Gottshall: If Your Honor please——

By the Court: Would you mind coming up to the desk? I think I can hear you better.

By Mr. Gottshall: I will try to talk loud. A few things I want to read. If you can't hear me, will you throw

something or admonish me, if that is all right, Your Honor. [fol. 300] By the Court: I don't hear you very well. If you want me to hear you,——

By Mr. Gottshall: I will come to the other side. Is it all right for me to stand up here?

By the Court: Yes.

By Mr. Stewart: Mr. Gottshall, will your pardon me, Mr. Andrews plans to address the court on some of the legal propositions involved. Maybe Mr. Gottshall would prefer Mr. Andrews to go first. Which would you like?

By Mr. Gottshall: I think so, Your Honor.

By Mr. Andrews: May I have about ten minutes, Your Honor, at this point?

By the Court: All right. Gentlemen, I will say the court considers this case and the questions raised in it of the very greatest importance. And I would like to have it fully developed on both sides. I am not inclined to restrict the argument unduly. I would like to hear you fully, what you have to say.

By Mr. Andrews: I want to briefly read at this point, as it underlies what else I might say, Judge Holmes' opinion in the Fleming against Tate in the District Court. Now, as Mr. Stewart so well pointed out, that decision reported in 156 Federal Second, Circuit Court of Appeals of the District Court of Columbia does not get down to the facts very closely, but Justice Holmes does get down to it, and I think touches the things Your Honor had in mind, as far as I know. Maybe Mr. Gottshall knows, of course he is right at the source of information about the cases all over the country, maybe Mr. Gottshall has something later [fol. 301] than this on exactly the point. But if so, I apologize for my ignorance, Mr. Gottshall, in going into this. Justice Holmes, some years ago the petitioner Edwin F. Tate was sentenced in this court to imprisonment for an aggregate term of forty years. (reads from Fleming versus Tate.) I might parenthetically say here they didn't even do that, they just washed the whole thing out, said nobody could be there.

By the Court: You may proceed.

By Mr. Andrews: It further appeared that petitioner employed, requested permission to testify at the hearing, but was informed that the board did not receive oral testimony. (Continues to read.) "He shall be given an op-

portunity to appear," that is the language that is in the statute. (Continues to read.) Now the next part of the decision is a discussion of the case, and Your Honor knows whose probation should be revoked. That part of Justice Holmes' discussion does not seem to be pertinent, so I will go down to the conclusion.

By the Court: Well, that part of the statute is even vaguer than the parole statute. It says that may be brought before the court. It doesn't say anything about a hearing there, does it?

By Mr. Andrews: No sir.

By the Court: In the probation case.

By Mr. Andrews: No, for it was taken before the court. The language there——

By the Court: And it is assumed if he is brought before the court, he was brought there for some purpose.

[fol. 302] By Mr. Andrews: Yes, that's where Justice Holmes goes into the hearing.

By the Court: The Escoe case is pertinent to this inquiry.

By Mr. Andrews: For that part, and it is further pertinent for this reason: There is a statement in the statute, maybe it's in one of the rules, that the status of a probationer shall be similar, and I can't quite get the words, to the parole status. In other words, it comprises that it is, that is what in reality it is, it is a form of parole. Now he goes into the Escoe case against Zerbst in great detail, and concludes that since in that case the Supreme Court on a writ of habeas corpus directed a discharge of the prisoner without prejudice to his arrest and commitment. As a result the general proceeding means if they go about it right, they of course could do it. Such is our concession here. Let them go about it properly. "Not only does it make it mandatory for the Board to permit counsel to appear at the hearing and hear the evidence offered at the hearing, but also as a practical matter—" (Continues to read.) This would not place an undue burden on the board. Incidentally now they have five instead of three members on the board, so it no doubt worked a great hardship on the board. (Continues to read.)

Now I want Your Honor to just give a minute's attention to these words the parole board would ask, if they wrote out written interrogatories and sent them to them, as Mr. Stewart indicated to Your Honor, and in the answer

they quoted, Your Honor will remember at the time of the return of the depositions they quoted the correspondence, well, I don't need to read it, it's before Your Honor. But I do want to read this part, "It has never been the policy, [fol. 303] however, to admit counsel to the deliberations of the board, either at the time it interviews the prisoner in connection with his application for parole, or at the time he appears before the board to make his statement in connection with its revocation or modification." That has been the policy since 1910. One of the cases I have here, I won't take the time to read it this moment, says the very fact that they have sanctioned it for thirty years now, thirty-eight years, probably of abuse, doesn't sanctify it now. "See rule 4(d), page 3 of our Rules and Regulations promulgated in 1936." Federal Boards of Parole have uniformly assumed, and they have since 1910, "in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board as to whether the welfare of society would be promoted by the granting, revocation or modification of parole." (Continues reading, from deposition of Dr. Killinger, page 21 of Petitioner's exhibit #3.) Dr Killinger said, "No finding has been made. No definite date can be stated at this time when a finding will be made. These men have been in jail about, soon be four months since they were arrested. No finding has been made. No definite date can be stated at this time when a finding will be made. However, there has been and will be no unnecessary delay in making a finding in these cases." Now that is his words, they will be the judge of whether it is unnecessary delay or not. They will likely also be the judge for them of when will be the definite date. "All appearances of prisoners before the Board of Parole are stenographically reported, and such appearances run well into the hundreds at every meeting held by the Board. The stenographic [fol. 304] notes are returned to the Board's offices in Washington and transcribed by the reporter upon his return to Washington following successive meetings at three or four different penal institutions. Thereafter each case receives separate consideration by the Board members, one-third

of whose time is consumed in holding parole meetings in the field and travel incidental thereto. This information is given in order that the court may appreciate that an elapsed period of even several months between appearance and decision in such matters can not be considered either unusual or unreasonable."

Now it helps not that counsel for the Government will talk about cases of men in prison who have applied for parole, and the board can't get to those cases for periods of time. A man who is in prison is in a far different situation from a man who has been released on parole and who asseverates in court without contradiction that he has lived a good life. To snatch him up and put him back is a far different thing from a man who is trying to make parole in the first place. Now what they are saying, that is the aggravated part of this thing, it is the thing that has got Mr. Stewart down, because he has lived so close to the witnesses, what they are saying, that inasmuch as we have all these institutions and we have—I think in the Congressional Record each one of them said he passed on about three thousand a year, that would be about nine or ten thousand cases, I believe some of them put as high as sixteen thousand cases. We are telling you what we are going to pass on, as number 1, or number 15,999. That's all that we have got, an estimate, at no distant future, at a time to be determined by us, we will be judges of whether it is reasonable or unreasonable. In the meantime great harm is being done by the parole system. Men's hearts [fol. 305] are broken throughout the country as a part of the publicity in this thing. State boards and federal boards have been terrified by this persecution, this insinuation against them that they have done something wrong. They are now, I submit to Your Honor, they are now more or less just in a state of terror about the thing, and they weasel out of it by saying, we don't know when we will act, we have to transcribe this. These men can stay out there in the penitentiary while a stenographer who reported the hearing reports the 15,999 other cases first if we want him to, because the court has nothing to do with respect to it. You know the elasticity of the writ. Your Honor is thoroughly familiar with the recent decisions, the flexibility of it perhaps is a better word, and know the necessity in a modern society of using it whenever it appears that action which was arbitrary and capricious

has resulted in the confinement of the people. And because, if it is that, it became illegal confinement. Now, Your Honor knows of course exceptional circumstances rule the court, I refer to Bowen against Johnson, a murder case I defended in this court before Your Honor some years ago where an exceptional circumstance ruled, and it was, the most recent case on that probably was Wade against Mayo, which is reported in the advance sheet of the Supreme Court Reporter, but not yet in the bound volume, 68 Supreme Court, page 1270, decided June 14th of this year, and on that point the court says, and citing Sunal versus Large and Neagle against United States, and five or six lower court cases. "Moreover the flexible nature of the writ of habeas corpus counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation on the writ." (Reads from Wade versus Mayo.) But the point I am refreshing Your Honor's recollection about there, I be-[fol. 306] lieve they have more in the brief, but I am assuming Your Honor knows them—(continues to read.)

I don't believe I want to trespass further on Your Honor's time. We only asked for an hour, and most of the cases are in our brief. I want to say one thing. It is very unfair to say to these men what the parole board apparently is attempting to do, Your Honor, because he overlooked two or three arrests on "GP." They have a way of arresting them in Chicago, and putting it on the blotter, "GP."

By the Court: I understand now you are not complaining it is a revocation for anything that took place prior?

By Mr. Andrews: That is true. I should not have alluded to that. What they are now saying is this: They are holding their hands behind their back, like we used to do as children, "guess what I have in my hand," and we are left to guess except with the limitation Your Honor has mentioned. It is something that happened since the release, but "guess what is is." You remember the game we used to play, "guess what I have in my hand." Your Honor going to sit here while they tell Your Honor they are putting you on notice they had a conference in the Department of Justice, and I would like to ask Mr. Gottshall to tell Your Honor whether he was not present and didn't form that reply, "that it may take us months" but in the meantime "whether we have got something in our hands or not,

you can merely guess." Now they have not even disclosed except by insinuation what the men did. They had a thing which did not constitute a hearing in any sense of the word. That is all we have to go by, is the asking of [fol. 307] insinuating questions. We respectfully ask Your Honor to dismiss these men under the proper order.

There are two or three ways Your Honor can release them. On bond, at such time as Your Honor sees fit, on the decision of this writ on this case. Or to discharge them without prejudice to the board to proceed properly, as Judge Holtzoff did in Fleming against Tate. I think the Circuit Court of Appeals, Your Honor knows, paid a high compliment to him. They said in a most careful opinion the district judge examined this matter. Your Honor knows Judge Holtzoff has sought to be a leader in this field. He was in the Department of Justice for many, many years, and I came to know him well and favorably. He did unlimited work, and gave his time and his life to the writing of the rules, and to the reporting of decisions on the rules when they were first promulgated that would not be available to us otherwise, and Judge Holtzoff has been in demand on the study and approach to questions of this kind.

Now he pointed out, he did something that could be done here, if Your Honor didn't see fit to do that. I see no reason on earth why men who possess valuable property and never having in any way, never had to be hunted, they could be called on the telephone, why they should not be released on a writ to come here, or Chicago, or any other place on this good earth, and it is not quite sufficient—I think sometimes in these things we ought to remember the 27th chapter of Matthew—we can't call for a bowl of water and wash our hands they find some fault with it. They go up to review these men in the light of what happened since they were released, not from the facts they were arrested on three years ago. The man Judge Holt-
[fol. 308] zoff had before him had forty years for a felony. We can't say that about these men.

By Mr. Gottshall: If Your Honor please, appearing as one of the attorneys for the respondent, perhaps more particularly as in behalf of the Parole Board, I feel almost shrunken in size after listening to all the accusations hurled at the Parole Board and others perhaps involved

in this proceeding. I think we would do well perhaps at the outset, and I will be brief as I possibly can, because I intend to ask Your Honor's permission to put what I have to say perhaps in more of the form of a brief for Your Honor's consideration, if the other side doesn't object. I am not here because of any importance attaching to these defendants, nor because of any unfavorable publicity, nor for pressure that has some times been used in connection with this proceeding, which Your Honor understands are present both here and in Chicago, as well as in Los Angeles. I think you know about Mr. Roselli——

By Mr. Stewart: Yes——

By Mr. Gottshall: As a matter of fact it seems to me that the jurisdiction if not the integrity perhaps of the Parole Board has been here seriously assailed, not only in the petition itself, but in what has been said orally.

It seems to me there is but a single issue involved here, and if I understand Your Honor's ruling of yesterday the conclusive, final, namely that the New York conviction, the original conviction is no longer in issue because not properly raised in a habeas corpus proceeding, then I think the single issue here is whether the parole board shall be permitted to finish its work in an orderly fashion as permitted and prescribed by the Statute.

[fol. 309] By the Court: Well, I think there is, you might say, a secondary issue, or it might be primary, and the one you have stated is secondary, and that is whether or not that parole violator warrant is valid.

By Mr. Gottshall: I will touch on that.

By the Court: The contention is under the warrant it is.

By Mr. Gottshall: It is true the warden holds by virtue, by the basis of the warrant, as the original conviction.

By the Court: I don't think so. I think the only way of getting them to the penitentiary is by the warrant, and nobody else could issue it except the parole board.

By Mr. Gottshall: That is quite true, that is quite true, but they have served out, after being taken in custody under the warrant, what basis is there for holding them except, as counsel for petitioner has put it, a combination of warrant plus the original judgment.

By the Court: Suppose the board revoked, did not revoke it properly. Were they serving that original sentence during that period of time, or were they being held under the parole violator warrant?

By Mr. Gottshall: They were certainly getting credit toward that sentence.

By the Court: I know, but they might not need credit; if they were unlawfully taken back, they have served a period of time not covered by the sentence.

By Mr. Gottshall: Now, assuming upon release for some reason or other by the parole board they have not served the entire sentence, had not reached the maximum return [fol. 310] date, as we put it, certainly they would be credited toward the sentence for the time served. Does that answer your question?

By the Court: No, the—suppose that the parole violator warrant had not issued at all. They would not be in the penitentiary, would they?

By Mr. Gottshall: That's right.

By the Court: And if they had not violated their parole, may be there wouldn't be any term there to serve of the original sentence. So it seems to me their decision—unless the violations are under the parole violator warrant, though they would get credit for it in the event the parole is revoked.

By Mr. Gottshall: I think we can proceed upon that premise.

By the Court: All right. That's what I have been quite interested in, as to whether or not this is a valid parole violator warrant.

By Mr. Gottshall: Well, of course——

By the Court: The presumption is it is valid.

By Mr. Gottshall: That's right, certainly no question about the presumptive validity.

By the Court: Now, the petitioner's evidence, the petitioner's claim, shows no violation and nothing upon which the warrant could be based. Does that or not establish the illegality of the warrant?

By Mr. Gottshall: Of course, aren't we anticipating there in connection with a habeas corpus proceeding? In reality this proceeding may be premature, if the statute [fol. 311] under which the parole board operates, which establishes a logical system for procedure on the one hand, and the fact that that procedure has not been concluded on the other hand, we say that habeas corpus at this time doesn't lie. Isn't the proper action, and I think Your Honor reflected that to some extent yesterday——

By the Court: Yes, it was in my mind, but on the other hand, if the very beginning of it is invalid, the whole procedure is begun by the parole violator warrant. Now, if that is invalid, what effect does that have on the entire proceeding?

By Mr. Gottshall: Well, I still maintain, as I suggested a moment ago, that Congress has prescribed an orderly system for procedure by the parole board.

By the Court: And that must be initiated by the parole violator warrant.

By Mr. Gottshall: Correct. Correctly said.

By the Court: Now, if the initiation is invalid, can the rest of it proceed? Now, I know you can't——

By Mr. Gottshall: May we put it this way——

By the Court: You can in a criminal case, you might issue a warrant, and the warrant is invalid, but the person is actually brought into court, and actually tried, the ineffectiveness of the warrant might not be an important question if it were not attached prior to the ultimate decision.

By Mr. Gottshall: In other words, the unlawful arrest would be waived, is that what you mean?

By the Court: Yes.

By Mr. Gottshall: Well, the whole thing, the central [fol. 312] issue here, Your Honor, I think is simply this: Unless we adhere to this proposition, we are just getting off the track. The parole board, Congress has said to the parole board, now here is your authority, section 717, and 723, their authority for the issuance of warrants. The issuance of warrant by a member of the board, a member of the parole board, or members, there 718 directs any officers in the United States to execute them.

By the Court: You have not quoted all of it, issue of warrants upon reliable information. Now the question is whether or not there was any reliable information, and the parole board comes into court and says, we are not going to tell you.

By Mr. Gottshall: I counter that suggestion, Your Honor, with the statement that while I don't question Your Honor's right to examine into a habeas corpus proceeding where administrative remedies had been exhausted, I think I am bound in behalf of the Government to question the propriety of this proceeding because that administrative remedy has not been exhausted.

By the Court: It might not have been lawfully begun. I don't think the, I judge by the evidence it has not.

By Mr. Stewart: This is music to our ears, too, Judge.

By Mr. Gottshall: If the test were a lawful or unlawful beginning, I can't conceive of how the parole board would operate at all.

By the Court: In other words, they go ahead and violate no provision of law, they sit by and they can still go on, nothing can stop them.

[fol. 313] By Mr. Gottshall: No——

By the Court: I don't understand your statement.

By Mr. Gottshall: Your Honor made the statement, I believe, about making mistakes, that the parole board can make a mistake at the very beginning.

By the Court: Yes.

By Mr. Gottshall: The very beginning, in issuance of the warrant, the warrant alleges the receipt of reliable information, that is the very origin of it. Now if that takes place, they make a mistake, and it is maintained by a habeas corpus proceedings can be undertaken to determine that question of whether they had it or not, then all the other statutes under which the parole board operates are simply out of the picture.

By the Court: They may be, as far as this case is concerned. I don't know.

By Mr. Gottshall: I don't profess to know either. I am simply suggesting what I believe the law to be on the subject. In any event, if the jurisdiction of the parole board——

By the Court: I will say this, though, Mr. Gottshall, the court considers that a most important, if not the most important part of this case. That is the validity of that parole warrant. I will give you the benefit of that so you might address yourself to it.

By Mr. Gottshall: May I ask the court this: Whether, assuming that to be of the importance attached to it by Your Honor, whether you believe——

By the Court: That is as far as habeas corpus cases are concerned.

[fol. 314] By Mr. Gottshall: Yes, sir. Well, you believe in a habeas corpus proceeding that can be inquired into in advance of whether the parole board, in advance of whether the parole has been violated, as attested or shown

by the action of the parole board in revoking the parole, or releasing again——

By the Court: Take the criminal case. Suppose a warrant is issued against a person without any foundation whatsoever, and the person is taken into custody under that warrant, and he files a habeas corpus proceeding, and says, I am unlawfully detained, there is no basis at all for this warrant, no reasonable cause for its issuance, in the habeas corpus court can the habeas corpus release him? They can release property, if you seize property, and where there is no foundation for it, you can release the property. Now, can't you release a person if he is unlawfully detained in that manner, under illegal warrant?

By Mr. Gottshall: Yes, but that is hardly, I suggest, Your Honor, politely, an analagous situation, their original arrest and original accusation. Here is the conviction, a release on grace, and an alleged violation procedure in accordance with the statute. Period. All we say is that at this state of the proceedings habeas corpus doesn't lie. Whether it does later——

By the Court: I don't think it would lie perhaps if the board had come in and shown that, its reasons for issuing the warrant, and when it was attacked, it didn't have to do it until it was attacked, but when the warrant was attached if they had come in and said to the court, these are the reasons we issued it, and this is the information it is based upon, the court would have had a different case from what it is here.

[fol. 315] By Mr. Gottshall: Of course we maintain that was done, I mean before this proceeding was begun.

By the Court: Well——

By Mr. Gottshall: May it please the court, there is attached to the warrant as issued and executed, a referral, a so-called referral, which stated in caption form the basis on which it was——

By the Court: What ground, I mean what violation does the government now say that these defendant petitioners are guilty of? What did they do?

By Mr. Gottshall: I am not a member of the parole board.

By the Court: I am talking, as far as this record is concerned, I am bound by this record.

By Mr. Gottshall: Yes, sir.

By the Court: If the board doesn't see fit to complete the

record, it seems to me I must pass on the record as it is made.

By Mr. Gottshall: I think that is correct.

By the Court: What does the record show as violation of their parole, or alleged violation? What do they claim?

By Mr. Gottshall: As disclosed by the record, and I think it was amply brought out yesterday when counsel for petitioner had one of them on the stand and examined them, the various points, conduct, failure to disclose certain things.

By the Court: You said that was not an issue in this [fol. 316] case, that the parole board said they are not considering anything that happened prior to the granting of the parole.

By Mr. Gottshall: They are not.

By the Court: Well, now, what happened after that, just state to the court what happened after that, that constituted a violation of parole or what you claim they did.

By Mr. Gottshall: I can't go beyond what the warrant, plus the referral shows.

By the Court: All right. Well, pass on to something else, then. I won't have that before me.

By Mr. Gottshall: You won't have that before you.

By the Court: Also the evidence of the parole board, I won't have that before me.

By Mr. Gottshall: I am a little disturbed by Your Honor's position, assuming or suggesting that habeas corpus lies to examine into the functions and actions of an administrative agency.

By the Court: Suppose you devote yourself to some authority on that question. I am very interested in that myself.

By Mr. Gottshall: The question that we have there is a case in this circuit, and it has already been cited, and refers to the case of Bowers versus Dishong in the Fifth Circuit where Bowers petitioned in habeas corpus immediately after his arrest, he was an alleged parole violator, and the Fifth Circuit in affirming the denial of the district court, stated very plainly that they, at that stage, there was no room, no basis for any habeas corpus activity for the simple [fol. 317] reason that Congress had provided an orderly procedure for carrying the matter of the alleged parole violation through to a conclusion, and the court was not concerned with that.

By the Court: Have you that case before you?

By Mr. Gottshall: Yes, sir.

By the Court: Let me see it. May I see it? You might read the portion you think is pertinent.

By Mr. Gottshall: That is all right, I prefer to have Your Honor look at it.

By the Court: Was the warrant attacked in this case?

By Mr. Gottshall: No, Your Honor——

By Mr. Stewart: No, that wasn't attacked, that is the distinction.

By the Court: Then did he claim the warrant was arbitrarily issued.

By Mr. Gottshall: I know that counsel for the petitioner in his brief, in the Chicago brief at page 44, in the DeLucia matter, tries to, or attempts to, shall we say, def-erentiate the Bowers versus Dishong from the instant case on the theory that no claim of lack of due process was made there. I don't perceive how the Bowers versus Dishong decision had been shrugged off as lightly as that, because that case might as well have involved the same circumstances in this case. In other words, the reading of the execution of the warrant, and an opportunity to appear before thus challenged, I can't understand, I don't perceive how the element of due process is involved in that at all. There is, as a mat- [fol. 318] ter of fact, in Clark versus Surprenant, which is also mentioned in the Chicago trial brief. I believe it is in 94 Federal Second, is the only instance where the district court accepted a habeas corpus proceeding, proceeded to hear the facts in the case immediately after the arrest of the alleged parole violator. In that instance they were, the discharge was affirmed, and no appeal was taken. It was simply a district court decision. That decision, however, is specifically mentioned in Bowers versus Dishong. The Circuit Court of Appeals in Bowers versus Dishong makes it very plain that it didn't accept the reasoning in that case. I should like to have no misunderstanding about this, what is the position of the Government at all in this matter. Your Honor is acquainted with that line of cases. We say that habeas corpus does not lie in any instance where, even if the petitioner's contentions are allowed and held valid, it doesn't entitle him to immediate discharge.

By the Court: Now, I stated that, I think, a time or two

during the trial of this case. It must be such a case where the petitioner would be entitled to his present release.

By Mr. Gottshall: That's right, that's right, Your Honor. Your Honor is probably more familiar with that than the speaker, having had many of that type of cases before, because I am quite sure I have been reading your decisions for nineteen years, and I will admit I agree with most of them, the great majority. But that is the Government's position. I can't emphasize it too strongly, that at this stage habeas corpus doesn't lie. Now, I anticipate, and since the suggestion was made while ago——

By the Court: Before you leave that point, may I sug- [fol. 319] gest this for your consideration and information to me. In those cases where action was brought, habeas corpus proceedings brought to stop proceedings of a criminal case in a state court, now there the courts held that they will not do that except under very rare and exceptional instances, but it doesn't say that habeas corpus courts can't do it. Won't that same rule apply as far as administrative matters are concerned? Ordinarily they won't interfere until all remedies have been exhausted, except under rare and exceptional circumstances.

By Mr. Gottshall: That is—aren't we considering two different jurisdictions there?

By the Court: Well, we are here, we have had the administrative board as a different jurisdiction, and the court.

By Mr. Gottshall: Mr. Tysinger suggests two different sovereignties. Is that a matter which Your Honor would like to have developed in connection with my memorandum?

By the Court: Yes, I would like to have you cover that. That is the reason I am throwing out the suggestion, either to discuss it now or in your memorandum.

By Mr. Gottshall: Well, I think enough has been said, unless Your Honor cares to question further about the position of the Government in respect to the Government's proposition that there is only a single issue involved here, and that is whether habeas corpus lies at this time to interfere or press upon the parole board the necessity for taking certain action. We don't think it does. Now, Mr. Andrews referred to Fleming versus Tate a while ago. That is a District of Columbia decision. He referred to the fact that you [fol. 320] were acquainted with Judge Holtzoff, as also am I, and I have been for a long time, and greatly respect his opinion. I don't ascribe to his views on his opinions,

as well as others, I differ, you know, the only thing I think may be said about that is one thing, and that is that this habeas corpus proceeding in Fleming versus Tate occurred after the parole board had taken final action. That doesn't appear from the decision as Mr. Andrews read it. But it is a fact because I have here the brief in the Circuit Court of Appeals and the statement of facts recites that the warrant was issued on June 13, 1945, that after his apprehension and confinement he was given a hearing before the board on December 6th, 1945, and his parole subsequently revoked thereafter.

By the Court: How long afterward was it revoked?

By Mr. Gottshall: It was prior to January 7, 1946.

By the Court: In other words, how long did he wait for the decision?

By Mr. Gottshall: Approximately a month, I take it from—I am judging by the dates here, but in any event, that petition for writ of habeas corpus wasn't filed until after the parole board had taken final action. There is another matter I think I will treat in the brief rather than take up the court's time here. It is mentioned just briefly by counsel for the petitioners here, and that is the Administrative Procedure Act. The Government does not believe that the Administrative Procedure Act has any application to the Parole Board.

By the Court: Wherein is it excepted? I looked for that. [fol. 321] It says all agencies of the Government. Now where is the exception?

By Mr. Gottshall: Well, sir, shall we put it this way? As to agencies not specifically named by the Act, nor specifically excluded from it, from its mandates, I might say. I think it would be agreed that they would be subject either to the Act as a whole, or not at all. Now there are other agencies included, and some made applicable, but without referring to them, because I shall attempt to make that clear in a memorandum brief, but in sections 2 and 3 and 4 and 6 of that Act, the provisions thereof for licensing, and hearing, and rule making, to which the public is invited, and may make suggestions and make proposals, certainly those sections have nothing to do, couldn't in any way be applied to the parole board's functions and duties.

By the Court: Do I understand——

By Mr. Gottshall: Where they are compared, as I say——

By the Court: I understand your argument is that unless

all the provisions of the act refer to a particular agency, then the agency is excluded from the Act?

By Mr. Gottshall: I say as to those not specifically included or excluded by the Act.

By the Court: Well, yes——

By Mr. Gottshall: That is the same thing.

By the Court: I am taking that class now. You say unless the Act applies in every particular, to each agency, an agency is by construction eliminated from the Act?

[fol. 322] By Mr. Gottshall: Now, I don't go quite that far, but let me put it another way. The major provisions, the major portions are not administrative procedure acts, such an act 2, 3, 4, 6, one adheres to rule making and licensing, it could have no application to the parole board, because those functions have nothing to do with parole board activities.

By the Court: I don't agree with you there. I think the one with respect to hearings would certainly have very serious application to the parole board, if they are passing on a man's liberty there, and as I construe the act, the parole act, it requires a hearing, not just to appear, but it requires a hearing. Now, if you have a hearing, it seems that section would certainly be applicable.

By Mr. Gottshall: Well, of course that is the very issue in this case, so far as the Administrative Procedure Act is concerned.

By the Court: Yes.

By Mr. Gottshall: I submit, call Your Honor's attention, however, to the fact that Title 18 as amended, which went into effect September 1, 1948, repeats the same language, and by the way eliminates entirely the requirement of reliable information in connection with the issuance of the warrant. That is 4205, I don't know whether that is a strengthening or weakening of it, I am not prepared to say, but under the administrative procedure act, I shall attempt to give Your Honor something on it further, in support of the proposition that it ought not to be applied to the parole board's duties and functions in part, and ignored as to the rest. Of course in section 10 you have an additional feature [fol. 323] which deserves some emphasis, because judicial review is there excluded as to those agencies which are vested with discretion by statute, and section 10E, I believe, provides that in any event no judicial review shall

be undertaken prior to the taking of final action by the administrative agency. I will develop that further also.

Now there is one thing I think I should answer. Much has been said here about the delay and it appears also that Your Honor is interested in how much time will elapse between the date of the appearance of these men before the board on September 8th, and the time when the board will take action of one kind or another. The answer in the deposition is truthful, and the answer to the interrogatory, I have forgotten which one, it is approximately the last one, that no definite time can be stated when the board will take final action. In the ordinary course of affairs, after a man has appeared before the board at the institution, then the member who heard him returns to Washington together with his stenographer, which may be anywhere from one to two, some times three weeks, a considerable time then necessarily elapses before those notes are transcribed and action taken by another, or two other members of the board. Now, if any——

By the Court: Does the practice of the board require every case to be reported and written out?

By Mr. Gottshall: That's right. That is correct, about, an application for release, and on hearings in connection with the alleged violation. Every appearance of a prisoner before the board is reported, stenographically reported, and made a part of his record, however long or short, and some of those hearings amount to a considerable number of pages. I, of course, in connection with the work, have [fol. 324] seen them over the years, and some are long, and some are short. Now where there is no other circumstances to be looked into, or investigated, where no further correspondence with any one is required to check what has been disclosed when the prisoner appeared before the board, it might be a simple case, where there are a number of co-defendants jointly indicted and jointly convicted, it not infrequently happens that the board, of necessity, after the appearance of several co-defendants before the board, undertakes further inquiry, makes further checking. You see how the responses, whether the responses tally or whether they differ. I agree with the court that no more time should be taken by the board to determine final action in this case than is absolutely necessary, but I suspect that if one or more of the members of the parole board were standing where

I am standing, and were asked that question by Your Honor, how soon are you going to act, they couldn't conscientiously and truthfully tell you exactly when, whether it would be next week, or the week after that.

By the Court: What would be the necessity of writing to various parties and to co-defendants in the original case on an issue of violation which is the only thing before the board, is the strict violation that he is charged with, that they charge the petitioner has been guilty of?

By Mr. Gottshall: Well, let's put it bluntly, flatly. Suppose there are two co-defendants. It properly alleges parole violations, says it consists of a number of things, but I had to assume that the responses of the prisoners to the parole board members varies as to those things.

By the Court: As to what things? They wouldn't be concerned with what one petitioner would do, or did, in viola-
[fol. 325] tion of his parole, would they? They wouldn't review the original case?

By Mr. Gottshall: No, that is not what I meant. Now, where, as here for example——

By the Court: What I am trying to do, Mr. Gottshall, I am very anxious to find out the attitude of the board and what the board itself has done and intends doing, and it seems to me that in all good faith, fairness, that there should be no objection on the part of the board to simply state to the petitioner what grounds they are charged with, what violations they are charged with. As I understand this record, they have not even told the petitioners what they have been guilty of. Now, if a hearing is necessary, and I think it is, what good does it do to bring a man up, have him appear before the board, and then refuse to tell him, not only refuse to let him have counsel, but refuse to tell him what he is charged with.

By Mr. Gottshall: I am inclined to differ with Your Honor on the proposition that these men have not been told what they are charged with, or have not been questioned about the very things the board suspects.

By the Court: Yes, but the board has said, we won't say anything about it, we won't tell the court. If they have any reason I don't see why they won't state it.

By Mr. Gottshall: Not for the purpose, we couldn't tell the court, we maintain this is not the forum in which that

matter should be presently tried, with all respect to Your Honor. I can see where we differ, I, myself, say——

By the Court: It seems to me one of the most fundamental things about a hearing is to tell the person charged what [fol. 326] they claim he is guilty of, and give him an opportunity to meet it.

By Mr. Gottshall: Well, that's exactly what happens when a man appears before the board.

By the Court: These men testified what happened before the board, and the board has not denied it. There is no evidence anything else took place other than what they said.

By Mr. Gottshall: How can the respondent in a habeas corpus proceeding possibly introduce or bring in, make a part of the record, evidence which may be in the peculiar knowledge of the board before that board has even decided what it is going to do?

By the Court: That was decided by the hearing. It decided they wouldn't let these men be represented by counsel, and they declined to tell them what they were charged with.

By Mr. Gottshall: No, no, that is merely a statement, I think, by—that is the uncorroborated testimony of the witness.

By the Court: Yes, and it is strengthened by the failure of the board to contradict or deny it, and it is for the board to bring in any evidence to show that it is incorrect. That's where I think the difficulty arises, the board could have made a very simple case out of it.

By Mr. Gottshall: All I say in response to that, Your Honor, is that to have done so, to have brought in here at this time, when the board merely has the matter under consideration, brought either a member of the board in here, or to disclose what evidence the board has, would have [fol. 327] meant the transferring of a parole board function into court for determination by the court, before the parole board itself completed its administrative functions and duties.

By the Court: Well, if the Government wants to stand on that issue, of course they have a right to do it, of course, not introduce any evidence at all.

By Mr. Gottshall: Well, we simply, I think we must, in view of the statutes, in view of the functions of habeas corpus, we must stand on the proposition that habeas

corpus doesn't lie to inquire into administrative functions before that administrative function and duty has been completely executed. I am satisfied, as I suggested while ago, there is but one judicial decision where that was undertaken, and that was Clark versus Surprenant, which was thoroughly discredited by the Fifth Circuit Court of Appeals. I am not going to take any more time, Your Honor, unless——

By the Court: I don't want to limit you, because I am very much interested, and would like to have your full statement, and you may have just as much time as you want.

By Mr. Gottshall: I propose, with the consent of the attorneys for the petitioners, to submit a memorandum brief setting forth these views more fully so that Your Honor may consider them at his leisure, if that is satisfactory.

By Mr. Stewart: I'll give my answer to Mr. Gottshall, that if we might have bail, he can take all the time he might require and need.

[fol. 328] By the Court: How much time you want, Mr. Gottshall?

By Mr. Gottshall: I hesitate to ask for two weeks. If I might have ten days from this date——

By the Court: All right.

By Mr. Gottshall: Is that satisfactory to you?

By the Court: You submit your brief to the other side and the other side—how much time do you want to reply?

By Mr. Stewart: I will reply to it right away, as soon as I get it.

By Mr. Gottshall: I will try to do it in less than ten days, Your Honor.

By the Court: Have you anything further now on the question of the validity of the parole violator warrant?

By Mr. Gottshall: Question of the validity of the parole?

By the Court: Yes.

By Mr. Gottshall: That would run to the question of reliable information.

By the Court: That's what I say. I would like to have pointed out to me, this record, not what was in the mind of somebody else, or in the mind of the board, but what this record before me shows was the basis of that parole violator warrant, what information.

By Mr. Gottshall: We refer——

By the Court: Of course it is presumed to be regular and correct.

[fol. 329] By Mr. Gottshall: Yes.

By the Court: But it may be attacked, and it has been attacked, and has not, the attack has not been rebutted, unless I am mistaken. That's what I am calling on you now, to point out what the record shows.

By Mr. Gottshall: Only in part, I reiterate, or repeat——

By the Court: I believe you did state that. Now is that the only thing in the record you rely on?

By Mr. Gottshall: That is the only thing we care to put in the record at this time.

By the Court: At this time, we are closing the record.

By Mr. Gottshall: All right, we will have to stand on the proposition of law.

By the Court: All right.

By Mr. Gottshall: With all respect to Your Honor.

By the Court: All right. Anything, Mr. Tysinger, you want to say?

By Mr. Tysinger: Your Honor said something about the warrant didn't tell them what they were charged with. I want to point out in the record, Your Honor, discussed yesterday, put in the record, put in as exhibits, the referral which is the direct charges enumerated, four in one, and five in the other, of what they were charged with, and that by the evidence and interrogatories and depositions will show that counsel was afforded, that by the parole board——

[fol. 330] By the Court: Now is there anything in the record to show information that the board had, or its officers had in support of those charges?

By Mr. Tysinger: Your Honor, like a bill of particulars, or details in an indictment, the referral is the charges, and I understand that is issued at the time, or prior to the time the warrant is issued.

By the Court: That is very true, but is the referral evidence of the things that it states?

By Mr. Tysinger: It is charges.

By the Court: You say charges. Now what evidence is there it is true or the person thought it true?

By Mr. Tysinger: Evidence is just like a trial, evidence coming before the hearing.

By the Court: What evidence now?

By Mr. Tysinger: In what we claim by the law is in the jurisdiction of the parole board at this time. Now it has been up legally on this matter before, same principle, in Fox versus Sanford, in the Fifth Circuit, I tried the case,

argued the case, 123 Federal Second, 335, and also the Circuit Court——

By the Court: Suppose you read that, see what the point is.

By Mr. Tysinger: Well, it is citing Bowers versus Dishong, another Fifth Circuit case, Mr. Gottshall. "There is no merit in the contention of the appellant. When he accepted release from the penitentiary, he did so subject to the terms of the statute which provided—(reads from Fox versus Sanford, 123 Fed. 2d, 335.)

[fol. 331] By the Court: That is the same principle.

By Mr. Tysinger: Same thing, parole——

By the Court: I think conditional release and parole that is supervised by the parole board——

By Mr. Tysinger: Of course provisions for judicial suspension of execution or imposition of sentence that is supervised and determined by the district court, the court having jurisdiction of the judicial part, that is the difference. Conditional release and parole come directly under our system.

Now it says, "that he did so subject to the terms," when he accepted release from the penitentiary, "he did so subject to the terms." (continues reading.) Citing sections 710, 716, and so forth. (Continues reading from case of Fox vs Sanford.) This was the case where he was committed on some offense, was alleged to, was indicted, accused of, and he was tried, and he was absolutely acquitted, and the parole board exercised its jurisdiction and on his conditional release violation, said he did, although he was acquitted by the state. Now, "as provided by statute, Fox was given a hearing before a member of the Board of Parole, and reliability or sufficiency of the information on which the board acted is not a matter for determination by the court in a proceedings for habeas corpus." That is this Fifth Circuit. Your Honor so held prior to this, and was affirmed.

By the Court: That is a matter of waiving the evidence. What about where there is absence of any evidence at all?

By Mr. Tysinger: It says sufficiency——

[fol. 332] By the Court: What?

By Mr. Tysinger: The same sufficiency, whether there be any at all——

By the Court: I don't——

By Mr. Tysinger: That's what it says, reliability, says

credibility of the witness, and then says, or sufficiency of the information, of the information. Now this warrant says upon reliable information, and this court says, this Fifth Circuit says that the reliability of the sufficiency of it there is not a matter for determination by the courts in a proceeding for habeas corpus.

By the Court: Well, I subscribe to that.

By Mr. Tysinger: Bowers versus Dishong, Christianson versus Zerbst.

By the Court: I subscribe to that. I say the parole officer who issued the warrant could do so in good faith on some evidence, and that the weight of that evidence was a sufficiency of it, the reliability of it wouldn't be a question for the court. But if there is no evidence at all, what would be the situation? And that's what I am asking here, whether or not there is any evidence.

By Mr. Tysinger: Well, there are two points. Mr. Gottshall argued the question on the point of law. We rest on that. I was merely pointing out, though, the sufficiency or the reliability under the Fifth Circuit Court decision of Bowers versus Dishong and Fox versus Sanford, which is in this Circuit, and followed.

By the Court: I decided the same thing in that case.

By Mr. Tysinger: Yes, sir, I tried both of them. I argued [fol. 333] them in the Court of Appeals and it upheld Your Honor's decision, and that is the law.

By the Court: Yes, and I hold it now.

By Mr. Tysinger: Yes, but there are other circuits have held it too, and other district courts. I want to point out the case of the United States versus Barc, which is a Sixth Circuit case, and which the Circuit Court, right on the point of this parole, it goes into it fully, on the statute involving the parole, and the powers of the parole board and citing with approval Bowers versus Dishong, Fox versus Sanford, Christianson versus Zerbst, in the Tenth Circuit. They said in the last part of the decision, speaking of the statutes under which the parole board is given discretion, and granting of parole, or revoking parole, by the many decisions he held it is a matter of grace that they are released and permitted to serve as citizens. (Reads from U. S. versus Barc, 141 Fed. 2d, 480). This court has gone along with that before, that, and there is the case of a hearing never held, it can not be determined whether or not they had one scintilla of evidence of violation of parole or whether that

was a sufficiency to establish any reasonable commissioned board or judiciary.

By the Court: I don't think you or Mr. Gottshall quite get what is troubling me.

By Mr. Tysinger: We hope to do it, Your Honor, that is the reason——

By the Court: That is this: I am not thinking about the procedure before the board right now. I am thinking about the initiation of the procedure, and that is the validity of [fol. 334] the warrant, the thing under which custody of these men was taken. Now the question is, if that warrant was not, didn't measure up to the statutory requirement, is there any proceedings, any legal proceedings at all before the board?

By Mr. Tysinger: We say that was all that was necessary as far as the warrant was concerned on the face of it, reliability of the information, upon reliable information, whatever the words are, that is in the terms of the statute, this meets the statute, it is supported by these decisions of this circuit, the Sixth Circuit, and the Tenth Circuit.

By the Court: Anything else, gentlemen?

By Mr. Tysinger: That is all.

By the Court: You have anything else, Mr. Gottshall?

By Mr. Stewart: I accept the Court's argument.

By the Court: Well, you had better not, I am not reaching any decision now.

By Mr. Stewart: I recognize it as something I am trying to convey, and Your Honor will remember on the application for the writ, that was our first river to cross, and Your Honor has restated the position. I believe it is sound. Now, as Mr. Tysinger was referring to his cases, for instance he referred to the United States versus Barc, and of course the fact that Fox versus Sanford's decision is by Your Honor and is good law, that doesn't make it applicable to this case. Your Honor knows that. In the United States versus Barc, petitioner was convicted of another crime while on parole. He claimed that good time caused his [fol. 335] sentence to expire before the violation, a point not here involved. There was no claim that the warrant was not properly issued in the case. The original sentence was even expired. (Reads from page 480 in the case of U. S. v. Barc, 141 Fed. 2d). You see how easy it is to distinguish the cases when you are talking about something, and you come back to the point, and I think those immigration cases

are back in point. And I cited Moore versus White in one of my briefs, in that case they used a telegram and letter. Your Honor remembers this business of having a proper warrant is jurisdictional. As soon as you find out a board doesn't have jurisdiction, habeas corpus is the remedy you pursue because the custody is illegal. It seems to me that is the solution here, and the situation is created by the attitude of the parole board. And as Your Honor has said, I think it is reasonable to stand before anybody who has any sense of justice and just say, all right, if these men have violated, tell us what it is, and give us a chance to meet it. We say there has been no violation. We say, and I think that it is a great deal of course, to ask the court to study these hundreds of pages as I have done, because that, I am a partisan, and that is my job. And Your Honor has so many other responsibilities. But the whole atmosphere of that cross examination of these members of the parole board shows that they had no evidence. I mean they said it, and I put it in, big heavy capital type in the last traverse I handed Your Honor. Judge Rogers, who signed the warrant, said "we don't have a bit of evidence against these men." Now, in the face of this, and in the face of their statements that they won't tell you, it just supports our statement under oath, and our testimony here, that they have none.

Now if the assumption made by Your Honor is the one [fol. 336] that should be made on this record, I can't help—I can't see how any other can be made here, is your hypothetical question. You have an administrative proceeding where they started out wrong, where they had no right to use it. If Mr. Gottshall happened to be the victim, if the board happened to reach up, there are plenty of blanks, if they just filled in Mr. Gottshall's name because they didn't like his politics or his position, of course he would come into court on habeas corpus. He would say, I don't come under that status, you have no right at all to use that warrant against me, and the same way with the men on parole. He has a right also to have the law followed, and while he is on parole, he has just as much right as Mr. Gottshall has within his right, which are great, of course. And as I see it, this is a case where the board has proceeded arbitrarily. Unfortunately for them they were put in a position where they were pressured, and if you read all those testimonies, as I have, Your Honor, you can see where they

gradually changed their attitude. At first, if I understood it then, and I was there when Daniel Lyons testified, he practically defied that Congressional Committee. He said he was not going to issue any warrant, and Judge Rogers said he wouldn't issue a warrant unless he could stand up in court, Judge Rogers had been years on that board, and he anticipated if he issued a warrant without any information he would stand a test in court. The reason he is not standing a test, he is not here, he just sends word to Your Honor he won't tell you.

Now that is the sum and substance of this. If that can happen, there is no justice. Now as a practical situation, couldn't Your Honor grant us, while these men couldn't go anywhere, they are on parole, they don't dare, every [fol. 337] time they ever even ask to go here and there, by a telephone call they will be before any board.

By the Court: I am not going to grant bail until I finally determine the case.

By Mr. Stewart: All right, will you shorten this? There is no occasion for the Government to have very long on brief matters, because I understand Mr. Gottshall has been familiar with the various pieces of litigation, they were sent to him and he has been preparing briefs in the matter. Will Your Honor set it down for a short time, within reason of course.

By the Court: It won't be necessary to set it down. I will reach a decision and hand that down. There will be no further hearing unless requested.

By Mr. Stewart: Well, Mr. Gottshall asked for ten days, and at that time I didn't know whether I was going to get bail, and I didn't protest. Now, knowing I am not going to get bail, would Your Honor cut that ten days down?

By the Court: No, I think that is—Now, as I understand it, the hearing has so developed the case that it comes down, as far as the warrant is concerned, that the only violation that the respondent charges of the parole are those charges set up in the referral. Now, I would like for counsel to go through the record and pick out and furnish to me in their memorandum, their memoranda, any evidence bearing on those particular charges, whether or not there is information that was false or not. I think, for example, if Judge Rogers had information that he considered reliable when he issued the warrant that might support the warrant, [fol. 338] even though it proved to be false, but I think in

view of the evidence here that would have to be shown by the respondent in this case. I think the petitioner has made out a case of no violation, we will say, and that these other references here that the warrant was issued when they weren't claiming there was any violations, so that seems to me very clearly to put on the respondent, on the board, if they did have any information or evidence to present it to the court, and if they didn't present it to the court, and haven't presented it to the court, then the court takes the record before it, and decides on that basis. I repeat, I just can't conceive how a governmental agency will charge a man with something, and then, I mean accuse him of something, and then fail to tell him what he is charged with, especially when the matter is raised as an issue in the courts. I just don't understand it.

Anything else, gentlemen?

(There being no further discussion from counsel, the hearing was concluded.)

Filed Feb. 4, 1949.

[fol. 339] PETITIONER'S EXHIBIT No. 2

DEPOSITION OF BORIS KOSTELANETZ

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

No. 2329

LOUIS COMPAGNA, et al., Relators,

vs.

W. H. HIATT, Warden

Deposition of the witness Boris Kostelanetz by the Relators, pursuant to notice dated October 11, 1948, in Room 231, United States Court House, New York, New York, on the 14th day of October, 1948, at 11 o'clock a.m., before Sibyl August Sills, a Notary Public for the State of New York.

APPEARANCES:

Wm. Scott Steward, 77 W. Washington Street, Chicago 2, Ill., Attorney for the Relators.
Francis Heyden, Special Assistant to the Attorney General, representing the Witness.

BORIS KOSTELANETZ, the said witness, being first duly sworn, deposes and says as follows:

Direct examination.

By Mr. Stewart:

Q 1. Will you please give your name and address and [fol. 340] state the part you had in the matter of the prosecution and conviction of Louis Compagna and others in the United States District Court for the Southern District of New York in indictment No. C 114-101 and affirmed on appeal in Compagna v. United States, 146 F2 524?

A. My name is Boris Kostelanetz. My address is 25 Broad Street, New York City, and I was Chief Counsel for the Government in the prosecution of this case.

Q 2. As attorney for the Government, did you examine the printed transcript of the record on file in the Circuit

Court of Appeals and are you able to say that it correctly and fully records the evidence and proceedings therein?

A. I examined parts of the record, and other parts were examined under my direction. I certified the record in the Circuit Court of Appeals as being correct.

Q 3. Particularly, are you correctly reported as to your closing argument, R. 3639, where you referred to the origin of the alleged conspiracy in Illinois, and did you say:

> "That is the beginning of the march of these men with the many names."

and did you in your argument say, R. 3638:

> "That is when the conspiracy with these defendants, I submit, started."?

A. The record correctly reflects what I said.

Q 4. Was your statement in argument a correct summation of the proof? Does the record show that the uncontradicted proof of the formation of the conspiracy took place in Illinois?

[fol. 341] A. To the best of my recollection, in the first part of the question, yes, it was; in answer to the second part of the question, the record will just have to speak for itself.

Q 5. Did you take part in the presentation of the evidence, on behalf of the Government, to the Grand Jury, and were you familiar with all of the evidence produced before that body?

A. The answer to Question No. 5 is, yes, I presented the case to the Grand Jury on behalf of the Government, and at that time I was familiar with the evidence produced before that body.

Q 6. Is it not a fact that the only evidence before the Grand Jury, to prove the formation of the conspiracy, was to the effect that the conspiracy was formed in Illinois?

A. I must decline to answer this question, on the ground that Rule Number 6-E of the Rules of Criminal Procedure specifically prohibits the disclosure of matters occurring before the Grand Jury, unless the Court directs such disclosure.

(Discussion off the record.)

Q 7. Did you take part in the preparation of the case for the prosecution and were you familiar with the facts as expected to be proved, on behalf of the Government?

A. Yes.

Q 8. Did you know during the presentation of the case to the Grand Jury and during the production of evidence before the trial jury, that your proof was based upon the facts shown in the printed transcript, referred to by [fol. 342] you in argument, to the effect that the conspiracy was formed in Illinois?

A. Insofar as Question Number 8 asks concerning anything which happened before the Grand Jury, I must decline to answer, on the ground previously indicated.

Insofar as the question deals with the production of proof at the trial, as shown in the printed transcript, it is my belief that the printed transcript is correct.

Insofar as the question refers to the conspiracy formed in Illinois, the transcript will have to speak for itself.

Boris Kostelanetz.

Sworn and subscribed to before me this 14th day of October, 1948. Sibyl August Sills, Notary Public, in the State of New York, Residing in New York County, N. Y. Co. Clk's No. 707 Reg. No. 1858-S-9. Commission Expires March 30, 1949. (Notarial Seal.)

[fol. 343] CERTIFICATE

STATE OF NEW YORK,
County of New York, ss:

The foregoing deposition was taken before me, as stated in the caption, and the answers reduced to writing by me, and I certify that I am not interested in the cause, nor kin or counsel to either of the parties.

Sibyl August Sills, Notary Public, in the State of New York, Residing in New York County, N. Y. Co. Clk's No. 707 Reg. No. 1858-S-9. Commission Expires March 30, 1949.

[fol. 344] PETITIONER'S EXHIBIT No. 3

DEPOSITIONS OF GEORGE G. KILLINGER AND B. G. MONKIEWICZ

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

No. 2329

HABEAS CORPUS

LOUIS COMPAGNA, Plaintiff,

vs.

W. H. HIATT, Warden, Defendant

No. 2330

HABEAS CORPUS

CHARLES GIOE, Plaintiff,

vs.

W. H. HIATT, Warden, Defendant

Washington, D. C.,

Friday, October 15, 1948, 10 A. M.

Depositions of George G. Killinger and B. J. Monkiewicz, witnesses in the above-entitled cases, called for examination by counsel for the plaintiffs, pursuant to notice served on all interested parties, before Norman L. Knauss, a Notary Public in and for the District of Columbia, in Room 418, Home Owners Loan Corporation Building, First Street and Indiana Avenue, Northwest, [fol. 345] Washington, D. C., *when* were present on behalf of the respective parties:

A. E. Gottshall, Esq., Criminal Division, Justice Department; and, J. H. De Witt, Esq., Member, U. S. Board of Parole, for the Defendant.

Proceedings

Mr. Gottshall: It is stipulated on the part of the Defendant that no objection is had to the depositions being taken before Norman L. Knauss, a Notary Public in and for the District of Columbia.

Thereupon, the witnesses, George G. Killinger and B. J. Monkiewicz, were sworn by the Notary Public to make true answers to the Interrogatories hereto attached:

The witness, Fred S. Rogers, being out of the city, could not be interrogated.

George G. Killinger one of the said witnesses, being duly sworn deposes and says as follows:

To Interrogatory No. 29, the witness answers and says:

"My name is George Glenn Killinger. My address is 5013 Fort Sumner Drive, Washington 16, D. C. I am Chairman of the U. S. Board of Parole."

[fol. 346] To Interrogatory No. 30, the witness answers and says:

"Prior to issuance of the warrants for Compagna, Gioe and DeLucia, their counsel, Mr. William Scott Stewart, requested opportunity to meet with the Parole Board. That request was not granted because that procedure is not required by any statute and is not followed by the Parole Board."

To Interrogatory No. 31, the witness answers and says:

"The answer to this is found in my answer to the immediately preceding question."

To Interrogatory No. 32, the witness answers and says:

"The answer to the first part of the question is "Yes."

"I decline to answer the second part of the question since it involves a matter now pending before the Board of Parole."

To Interrogatory No. 33, the witness answers and says:

"Answers to the three questions here involved is declined because they relate to a matter now pending before the Board of Parole."

To Interrogatory No. 34, the witness answers and says:

"I decline to answer on the ground that the question pertains to a matter now pending before the Board of Parole."

To Interrogatory No. 35, the witness answers and says:

"I have been advised that Section 1002, Title 5, United States Code, which is part of what is commonly referred to as the 'Administrative Procedure Act', is inapplicable to the U. S. Board of Parole."

[fol. 347] To Interrogatory No. 36, the witness answers and says:

"The answer is the same as that in question No. 35."

To Interrogatory No. 37, the witness answers and says:

"The answer is the same as that in question No. 35."

To Interrogatory No. 38, the witness answers and says:

"Yes".

To Interrogatory No. 39, the witness answers and says:

"I decline to answer, because:

"(a) It involves a matter now pending before the Board of Parole; and,

"(b) The Administrative Procedure Act is believed to be inapplicable to the Board of Parole."

To Interrogatory No. 40, the witness answers and says:

"By letter of July 26, 1948, counsel for the parolees requested 'the benefit of counsel at all stages of the proceeding including those preliminary to the hearing.' The attitude of the Board of Parole upon that request is reflected in a letter sent by the Board to William Scott Stewart, dated August 6, 1948. Copies of this correspondence are incorporated herein and made part of this reply.

[fol. 348] "Wm. Scott Stewart

Lawyer

Suite 1602, Chicago Temple

77 W. Washington Street

Chicago 2

July 26, 1948.

In re Louis Compagna

"Board of Pardons, Washington, D. C.

"As attorney for Louis Compagna, I am writing you to request, as a part of your hearing under the Statute concerning the charge of violation of parole, the following:

"1. The benefit of counsel at all stages of the proceeding, including those preliminary to the hearing.

"2. A specification of the charges or outline of the evidence upon which the warrant was issued and said to be reliable by the member signing the warrant. This to be furnished in advance of the hearing in order to give the parolee an opportunity to prepare.

"3. If there is to be any attempt to revoke the parole on the ground that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole, Compagna requests a statement to that effect with a specification of the reasons.

"4. Designation in advance of the time and place of [fol. 349] the intended hearing in order that Compagna may have present his witnesses.

"5. The privilege of confronting any witnesses who claim to know of any violation and to hear their testimony and to cross examine.

"6. The opportunity and permission to produce witnesses.

"7. Permission to have counsel present at all stages of the hearing and to have the benefit of representation by counsel.

"8. Permission to have present at all stages of the hearing a court reporter to be selected and paid by Compagna, or that the Board require the presence of a court reporter and furnish Compagna, at his expense, with a transcript.

"9. Notification of the action of the Board together with a copy of any findings made or orders entered.

"10. A copy of the rules of the Board or such regulations as may be said to govern or bear upon the matter of the hearing.

"In other words we would like a hearing which conforms with due process. If in advance of the hearing you decide not to grant these requests or parts of them will you please indicate your decision and designate such portions as you see fit to grant.

"I am sending a copy of this letter to Compagna in order that he might request these rights in person and will, of course, keep him informed of any reply you make to me.

[fol. 350] "If your Board conducts a hearing without including the matters requested it is our intention, in the event of an adverse decision, to complain to the courts of the denial of due process.

"Yours very truly, (S.) Wm. Scott Stewart.

WSS: JA

Copy. August 6, 1948.

"William Scott Stewart, Esq., 77 West Washington Street, Chicago 2, Illinois.

Re: Charles Gioe and Louis Compagna

"Dear Mr. Stewart:

"Your letters of July 26, addressed to the Board of Pardons, but obviously intended for the United States Board of Parole, are herewith acknowledged.

"In these identical letters, one for each of the above named two prisoners, you request, as counsel, that they be accorded the benefit of counsel "at all stages of the proceeding" relating to their alleged parole violation; that you be advised of the time and place of hearing and that you be supplied in advance of such hearing with an outline of the evidence upon which warrants were issued; that opportunity be given to produce witnesses and to cross-examine any Board witnesses, and that a court reporter (at the prisoners' expense) be present at such hearing and furnish the prisoners each with a transcript. You state in conclusion that if the Board does not comply with your request [fol. 351] and thereafter revokes parole you intend to complain to the courts that due process has been denied.

"Two matters contained in your letter can be readily disposed of. One is your request for a copy of the Boards' Rules and Regulations. A copy is enclosed. The other is your request for specifications if "there is to be any attempt to revoke the parole on the ground that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole." Upon that point you have our assurance that any action we may take looking to revocation of parole, will be based upon events occurring subsequent to release on parole.

"We shall be glad to confer with you as counsel for these prisoners at our office in Washington or consider any pertinent information you may wish to submit in their behalf. It has never been the policy, however, to admit counsel to the deliberations of the Board either at the time it interviews the prisoner in connection with his application for parole or at the time he appears before the Board to make his statement in connection with its revocation or modification. See Rule 4(d), page 3, of our Rules and Regulations promulgated in 1936. Federal Boards of Parole have uniformly assumed, in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board as to whether the welfare of society would be promoted by the granting, revocation or modification of parole.

"Parole is not a legal right vested in a prisoner. It is merely the granting of permission, as an administrative [fol. 352] act by an executive agency, to a prisoner to serve a portion of his sentence outside the prison walls. The parolee continues, both actually and legally, to be in custody. He is, however, allowed to remain in the community within limits fixed by the Board but under conditions that permit of reincarceration in the event of misbehavior, or in the event the Board believes continuance of the prisoner on parole is no longer compatible with the welfare of society.

"To sum up, it is our position that a formal hearing of the kind you seek is not provided for by the statute. We shall, however, be glad to have you submit in writing, or in person at our headquarters, any material or information bearing on these cases.

"Cordially, (S.) George G. Killinger, Chairman, U. S. Board of Parole."

To Interrogatory No. 41, the witness answers and says:

"The answer is the same as in question No. 35."

To Interrogatory No. 42, the witness answers and says:

"Compagna and Gioe were given an opportunity to appear before Board members Killinger and Monkiewicz at Atlanta Penitentiary on September 8, 1948. At such appearance both Compagna and Gioe read to the Board members a copy of the letter written by Mr. Stewart to the Board of Parole on July 26, 1948, copy of which is made part of my reply to question No. 40. Gioe read the said letter at the start of his appearance and thereafter answered all [fol. 353] questions without objection. Compagna answered all questions without objection and at the conclusion of his appearance read the said letter of July 26, 1948. Section 719, Title 18, United States Code, now Section 4207, same Title, which is the authority under which the Board acts in such matters, contains no provision for representation by counsel. I am unable to state therefore that these parolees were denied the usual requirements as to due process. As stated in the answer to question No. 35, the Administrative Procedure Act is believed inapplicable to the Board of Parole."

To Interrogatory No. 43, the witness answers and says:

"The Board of Parole has given no consideration to Section 1006 (d), Title 5, United States Code, a portion of the Administrative Procedure Act, because that Act is believed to be inapplicable to the Board of Parole."

To Interrogatory No. 44, the witness answers and says:

"No decision has been reached."

To Interrogatory No. 45, the witness answers and says:

"No finding has been made. No definite date can be stated at this time when a finding will be made. However, there has been and will be no unnecessary delay in making a finding in these cases. All appearances of prisoners before the Board of Parole are stenographically reported and such appearances run well into the hundreds at every meeting held by the Board. The stenographic notes are

returned to the Board's offices in Washington and transcribed by the reporter upon his return to Washington following successive meetings at three or four different penal institutions. Thereafter each case receives separate consideration by the Board members, one-third of whose time [fol. 354] is consumed in holding parole meetings in the field and travel incidental thereto. This information is given in order that the court may appreciate that an elapsed period of even several months between appearance and decision in such matters cannot be considered either unusual or unreasonable."

To Interrogatory No. 46, the witness answers and says:

"Yes. In explanation I will add that there is neither a statutory nor customary provision for furnishing such transcripts to parolees."

To Interrogatory No. 47, the witness answers and says:

"I decline to answer because it involves a matter now pending before the Board of Parole."

To Interrogatory No. 48, the witness answers and says:

"The Board declines to produce the files in these cases upon the ground that they relate to a matter now pending before the board."

George Glenn Killinger.

Subscribed and sworn to this 15th day of October, 1948. Norman L. Knauss, Notary Public, in and for the District of Columbia. My commission expires March 31, 1953. (Notarial Seal.)

[fol. 355] B. J. Monkiewicz, one of the said witnesses, being duly sworn, deposes and says as follows:

To Interrogatory No. 49, the witness answers and says:

"My name is B. J. Monkiewicz. My Washington address is 2121 Virginia Avenue, Northwest, Washington, D. C. I am a member of the United States Board of Parole."

To Interrogatory No. 50, the witness answers and says:

"Prior to issuance of the warrants for Compagna, Gioe and DeLucia, their counsel, Mr. William Scott Stewart, requested opportunity to meet with the Parole Board. That request was not granted because that procedure is not required by any statute and is not followed by the Parole Board."

To Interrogatory No. 51, the witness answers and says:

"The answer to this is found in my answer to the immediately preceding question."

To Interrogatory No. 52, the witness answers and says:

"The answer to the first part of the question is 'Yes.'

"I decline to answer the second part of the question since it involves a matter now pending before the Board of Parole."

To Interrogatory No. 53, the witness answers and says:

"Answers to the three questions here involved is declined because they relate to a matter now pending before the Board of Parole."

To Interrogatory No. 54, the witness answers and says:

[fol. 356] "I decline to answer on the ground that the question pertains to a matter now pending before the Board of Parole."

To Interrogatory No. 55, the witness answers and says:

"I have been advised that Section 1002, Title 5, United States Code, which is part of what is commonly referred to as the 'Administrative Procedure Act,' is inapplicable to the U. S. Board of Parole."

To Interrogatory No. 56, the witness answers and says:

"The answer is the same as that in question No. 55."

To Interrogatory No. 57, the witness answers and says:

"The answer is the same as that in question No. 55."

To Interrogatory No. 58, the witness answers and says:

"Yes."

To Interrogatory No. 59, the witness answers and says:

"I decline to answer, because:

"(a) It involves a matter now pending before the Board of Parole; and,

"(b) The Administrative Procedure Act is believed to be inapplicable to the Board of Parole."

To Interrogatory No. 60, the witness answers and says:

"By letter of July 26, 1948, counsel for the parolees requested 'the benefit of counsel at all stages of the proceedings including these preliminary to the hearing.' The attitude of the Board of Parole upon that request is reflected in a letter sent by the Board to William Scott Stewart, dated August 6, 1948. Copies of this correspondence are incorporated herein and made part of this reply.

[fol. 357] "Wm. Scott Stewart

Lawyer

Suite 1602, Chicago Temple

77 W. Washington Street, Chicago 2

July 26, 1948.

In re Louis Compagna

"Board of Pardons, Washington, D. C.

"As attorney for Louis Compagna, I am writing you to request, as part of your hearing under the Statute concerning the charge of violation of parole, the following:

"1. The benefit of counsel at all stages of the proceeding, including those preliminary to the hearing.

"2. A specification of the charges or outline of the evidence upon which the warrant was issued and said to be reliable by the member signing the warrant. This to be furnished in advance of the hearing in order to give the parolee an opportunity to prepare.

"3. If there is to be an attempt to revoke the parole on the ground that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole, Compagna requests a statement to that effect with a specification of the reasons.

"4. Designation in advance of the time and place of the intended hearing in order that Compagna may have present his witnesses.

[fol. 358] "5. The privilege of confronting any witnesses who claim to know of any violation and to hear their testimony and to cross-examine.

"6. The opportunity and permission to produce witnesses.

"7. Permission to have counsel present at all stages of the hearing and to have the benefit of representation by counsel.

"8. Permission to have present at all stages of the hearing a court reporter to be selected and paid by Compagna, or that the Board require the presence of a court reporter or furnish Compagna, at his expense, with a transcript.

"9. Notification of the action of the Board together with a copy of any findings made or orders entered.

"10. A copy of the rules of the Board or such regulations as may be said to govern or bear upon the matter of the hearing.

"In other words we would like a hearing which conforms with due process. If in advance of the hearing you decide not to grant these requests or parts of them will you please indicate your decision and designate such portions as you see fit to grant.

"I am sending a copy of this letter to Compagna in order that he might request these rights in person and will, of course, keep him informed of any reply you make to me.

"If your Board conducts a hearing without including the matters requested it is our intention, in the event of an [fol. 359] adverse decision, to complain to the courts of the denial of due process.

"Yours very truly, (S.) Wm. Scott Stewart.

WSS:JA.

(Copy) "August 6, 1948.

"William Scott Stewart, Esq., 77 West Washington Street, Chicago 2, Illinois.

Re: Charles Gioe and Louis Compagna

"DEAR MR. STEWART:

"Your letters of July 26, addressed to the Board of Pardons, but obviously intended for the United States Board of Parole, are herewith acknowledged.

"In these identical letters, one for each of the above named two prisoners, you request, as counsel, that they be accorded the benefit of counsel 'at all stages of the proceeding' relating to their alleged parole violation; that you be advised of the time and place of hearing and that you be supplied in advance of such hearing with an outline of the evidence upon which warrants were issued; that opportunity be given to produce witnesses and to cross-examine any Board witnesses, and that a court reporter (at the prisoners' expense) be present at such hearing and furnish the prisoners each with a transcript. You state in conclusion that if the Board does not comply with your request and thereafter revokes parole you intend to complain to the courts that due process has been denied.

[fol. 360] "Two matters contained in your letter can be readily disposed of. One is your request for a copy of the Boards' Rules and Regulations. A copy is enclosed. The other is your request for specifications if 'there is to be any attempt to revoke the parole on the ground that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole.' Upon that point you have our assurance that any action we may take looking to revocation of parole, will be based upon events occurring subsequent to release on parole.

"We shall be glad to confer with you as counsel for these prisoners at our offices in Washington or consider any pertinent information you may wish to submit in their behalf. It has never been the policy, however, to admit counsel to the deliberations of the Board either at the time it interviews the prisoner in connection with his application for parole or at the time he appears before the Board to make his statement in connection with its revocation or modification. See Rule 4(d), page 3, of our Rules and Regulations promulgated in 1936. Federal Boards of Parole

have uniformly assumed, in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board as to whether the welfare of society would be promoted by the granting, revocation or modification of parole.

"Parole is not a legal right vested in a prisoner. It is merely the granting of permission, as an administrative act by an executive agency, to a prisoner to serve a portion of his sentence outside the prison walls. The parolee con-
[fol. 361] tinues, both actually and legally, to be in custody. He is, however, allowed to remain in the community within limits fixed by the Board but under conditions that permit of reincarceration in the event of misbehavior, or in the event the Board believes continuance of the prisoner on parole is no longer compatible with the welfare of society.

"To sum up, it is our position that a formal hearing of the kind you seek is not provided by the statute. We shall, however, be glad to have you submit in writing, or in person at our headquarters, any material or information bearing on these cases.

"Cordially, (S.) George G. Killinger, Chairman, U. S. Board of Parole."

To Interrogatory No. 61, the witness answers and says:

"The answer is the same as in question No. 55."

To Interrogatory No. 62, the witness answers and says:

"Compagna and Gioe were given an opportunity to appear before Board members Killinger and Monkiewicz at Atlanta Penitentiary on September 8, 1948. At such appearance both Compagna and Gioe read to the Board members a copy of the letter written by Mr. Stewart to the Board of Parole on July 26, 1948, copy of which is made part of my reply to Question No. 60. Gioe read the said letter at the start of his appearance and thereafter answered all questions without objection. Compagna answered all
[fol. 362] questions without objection and at the conclusion of his appearance read the said letter of July 26, 1948. Section 719, Title 18, United States Code, now Section 4207, same Title, which is the authority under which the Board acts in such matters, contains no provision for representa-

tion by counsel. I am unable to state, therefore, that these parolees were denied the usual requirements as to due process. As stated in the answer to question No. 55, the Administrative Procedure Act is believed to be inapplicable to the Board of Parole."

To Interrogatory No. 63, the witness answers and says:

"The Board of Parole has given no consideration to Section 1006(d), Title 5, United States Code, a portion of the Administrative Procedure Act, because that Act is believed to be inapplicable to the Board of Parole."

To Interrogatory No. 64, the witness answers and says:

"No decision has been reached."

To Interrogatory No. 65, the witness answers and says:

"No finding has been made. No definite date can be stated at this time when a finding will be made. However, there has been and will be no unnecessary delay in making a finding in these cases. All appearances of prisoners before the Board of Parole are stenographically reported and such appearance- run well into the hundreds at every meeting held by the Board. The stenographic notes are returned to the Board's offices in Washington and transcribed by the reporter upon his return to Washington following successive meetings at three or four different penal institutions. Thereafter each case receives separate consideration by the Board members, one-third of whose time [fol. 363] is consumed in holding parole meetings in the field and travel incidental thereto. This information is given in order that the court may appreciate that an elapsed period of even several months between appearance and decision in such matters cannot be considered either unusual or unreasonable."

To Interrogatory No. 66 the witness answers and says:

"Yes. In explanation I will add that there is neither a statutory nor customary provision for furnishing such transcripts to parolees."

To Interrogatory No. 67, the witness answers and says:

"I decline to answer because it involves a matter now pending before the Board of Parole."

To Interrogatory No. 68, the witness answers and says:

"The Board declines to produce the files in these cases upon the ground that they relate to a matter now pending before the Board."

B. J. Monkiewicz.

Subscribed and sworn to this 15th day of October, 1948. Norman L. Knauss, Notary Public, in and for the District of Columbia. My commission expires March 31, 1953. (Notarial Seal.)

[fol. 364] Certificate of Notary Public

I, Norman L. Knauss, the officer before whom the foregoing depositions were taken, do hereby certify that the witnesses whose testimony appears in the foregoing depositions were duly sworn by me; that the testimony of said witnesses was taken by me in shorthand and thereafter reduced to typewriting under my direction; that said depositions are a true record of the testimony given by said witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the actions in which these depositions were taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested, in the outcome of the actions.

Norman L. Knauss, Notary Public in and for the District of Columbia. (Notarial Seal.)

[fol. 365] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

LOUIS COMPAGNA, et al., Relators,

vs.

W. H. HIATT, Warden

Before the Honorable E. Marvin Underwood, District Judge

INTERROGATORIES

Interrogatories Propounded to Boris Kostelanetz

1. Will you please give your name and address and state that part you had in the matter of the prosecution and conviction of Louis Compagna and others in the United States District Court for the Southern District of New York in indictment No. C 114-101 and affirmed on appeal in *Compagna* v. *United States*, 146 F^2 524?

2. As attorney for the Government, did you examine the printed transcript of the record on file in the Circuit Court of Appeals and are you able to say that it correctly and fully records the evidence and proceedings therein?

3. Particularly, are you correctly reported as to your closing argument, R. 3639, where you referred to the origin of the alleged conspiracy in Illinois and did you say:

> [fol. 366] "That is the beginning of the march of these men with the many names."

and did you in your argument say, R. 3638:

> "That is when the conspiracy with these defendants, I submit, started."?

4. Was your statement in argument a correct summation of the proof? Does the record show that the uncontradicted proof of the formation of the conspiracy took place in Illinois?

5. Did you take part in the presentation of the evidence, on behalf of the Government, to the Grand Jury, and were you familiar with all of the evidence produced before that body?

6. Is it not a fact that the only evidence before the Grand Jury, to prove the formation of the conspiracy, was to the effect that the conspiracy was formed in Illinois?

7. Did you take part in the preparation of the case for the prosecution and were you familiar with the facts as expected to be proved, on behalf of the Government?

8. Did you know during the presentation of the case to the Grand Jury and during the production of evidence before the trial jury, that your proof was based upon the facts shown in the printed transcript, referred to by you in argument, to the effect that the conspiracy was formed in Illinois?

[fol. 367] Interrogatories Propounded to Fred S. Rogers

9. Will you please give your name and address and state your position in the service of the Government?

10. Before you signed the warrant for Compagna, De Lucia and Gioe, is it not a fact that they requested of you an opportunity to be heard and that you denied this privilege?

11. You may state your reasons for denial of a hearing before you took action.

12. Is the testimony given by you correctly reported in the printed copy of the volume entitled, "Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives Eightieth Congress Second Session."? Would you make the same answers here if the same questions were here put to you?

13. In the warrant signed by you, you recite that reliable information has been presented to you of a violation. Will you please state what the information is as to each case? When it reached you? Its source, and your reasons for believing it to be reliable?

14. Have you been engaged in the performance of investigative functions for the Parole Board in these matters?

15. Has the Parole Board caused the publication of information, rules, opinions, orders and public records as required by sec. 1002 of Title 5, United States Code?

[fol. 368] 16. Has the Parole Board engaged in Rule Making as required by sec. 1003 of Title 5, United States Code?

17. In these cases, has the Parole Board made any effort to comply with sec. 1004, Title 5, United States Code?

18. Have these parolees petitioned the Parole Board for rule making and declaratory judgment under the provisions of the Administrative Procedure Act as shown by copy of petition appended?

19. What is the finding or action of the Board on this petition, and what are the grounds for the action or failure to act on this petition?

20. Is it a fact that these parolees have requested and the Parole Board has denied the right to be accompanied, represented and advised by counsel, in the matter of hearings before the Parole Board on the question as to whether or not there has been a violation of parole?

21. Has the Parole Board made any effort to comply with sec. 1006, Chapter 5, United States Code as to Hearings?

22. Is it not true that a so-called hearing as to the cases of Compagna and Gioe was held in the Penitentiary at Atlanta by two members of the Parole Board, George Killinger and B. J. Monkiewicz, in which hearing the parolees were denied the right of counsel, and the usual requirements as to due process, and that no effort was made to comply with the Administrative Procedure Act?

23. Is it not true that the Parole Board has refused, although requested, to postpone the effective date of the action taken in committing these parolees as required by sec. 1006 (d), Title 5, United States Code?

[fol. 369] 24. Have the members of the Parole Board who conducted the hearing of September 8, 1948, in Atlanta, made a decision, and if so what is that decision?

25. Has the Parole Board made a finding, and if so, what are the reasons and basis therefor, upon all material issues of fact, law and discretion presented on the record, and what is the appropriate rule, order, sanction, relief or denial thereof? If no finding has been made please state when we may expect a finding and reasons for delay.

26. Is it not true that these parolees have requested a transcript of the hearing of September 8, 1948, and have

offered to pay for the same, and that the Parole Board has refused to furnish such a transcript?

27. Give a summary of the evidence upon which it is claimed that there has been a violation of parole?

28. Will you please produce and made a part of this deposition a complete copy of the record of the Parole Board as to the matters here involved?

INTERROGATORIES PROPOUNDED TO GEORGE KILLINGER

29. Will you please give your name and address and state your position in the service of the Government?

30. Before Judge Rogers signed the warrant for Compagna, DeLucia and Gioe, is it not a fact that they requested an opportunity to be heard and that this privilege was denied?

31. You may state your reasons for denial of a hearing before action was taken.

[fol. 370] 32. Is the testimony given by you correctly reported in the printed copy of the volume entitled, "Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives Eightieth Congress Second Session."? Would you make the same answers here if the same questions were here put to you?

33. In the warrant signed by Judge Rogers, it is recited that reliable information of a violation has been presented. Will you please state what the information was as to each case? When it reached you? Its source, and your reasons for believing it to be reliable?

34. Have you been engaged in the performance of investigative functions for the Parole Board in these matters?

35. Has the Parole Board caused the publication of information, rules, opinions, orders and public records as required by sec. 1002, Title 5, United States Code?

36. Has the Parole Board engaged in Rule Making as required by sec. 1003 of Title 5, United States Code?

37. In these cases, has the Parole Board made any effort to comply with sec. 1004, Title 5, United States Code?

38. Have these parolees petitioned the Parole Board for rule making and declaratory judgment under the provisions of the Administrative Procedure Act as shown by a copy of the petition here appended?

39. What is the finding or action of the Board on this petition, and what are the grounds for the action, or failure to act, on this petition?

[fol. 371] 40. Is it a fact that these parolees have requested, and the Parole Board has denied, the right to be accompanied, represented and advised by counsel, in the matter of hearings before the Parole Board, on the question as to whether or not there has been a violation of parole?

41. Has the Parole Board made any effort to comply with sec. 1006, Chapter 5, United States Code as to Hearings?

42. Is it not true that a so-called hearing as to the cases of Compagna and Gioe was held in the Penitentiary at Atlanta by two members of the Parole Board, George Killinger and B. J. Monkiewicz, in which hearing the parolees were denied the right of counsel, and the usual requirements as to due process, and that no effort was made to comply with the Administrative Procedure Act?

43. Is it not true that the Parole Board has refused, although requested, to postpone the effective date of the action taken in committing these parolees as required by sec. 1006 (d), Title 5, United States Code?

44. Have the members of the Parole Board who conducted the hearing of September 8, 1948, in Atlanta, made a decision, and if so what is that decision?

45. Has the Parole Board made a finding and if so what are the reasons and basis therefore upon all material issues of fact, law and discretion presented on the record and what is the appropriate rule, order, sanction, relief or denial thereof? If no finding has been made please state when we may expect a finding and reasons for delay.

46. Is it not true that these parolees have requested a transcript of the hearing of September 8, 1948, and have [fol. 372] offered to pay for the same, and that the Parole Board has refused to furnish same?

47. Give a summary of the evidence upon which it is claimed that there has been a violation of parole?

48. Will you please produce and make a part of this deposition a complete copy of the record of the Parole Board as to the matters here involved?

INTERROGATORIES PROPOUNDED TO B. J. MONKIEWICZ

49. Will you please give your name and address and state your position in the service of the Government?

50. Before Judge Rogers signed the warrant for Compagna, DeLucia and Gioe, is it not a fact that they requested of you an opportunity to be heard and that this privilege was denied?

51. You may state your reasons for denial of a hearing before action was taken.

52. Is the testimony given by you correctly reported in the printed copy of the volume entitled, "Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives Eightieth Congress Second Session."? Would you make the same answers here if the same questions were here put to you?

53. In the warrant signed by Judge Rogers, Judge Rogers recites that reliable information has been presented to him of a violation. Will you please state what the information was as to each case? When it reached you? Its source, [fol. 373] and your reasons, if any, for believing it to be reliable?

54. Have you been engaged in the performance of investigative functions for the Parole Board in these matters?

55. Has the Parole Board caused the publication of information, rules, opinions, orders and public records as required by sec. 1002, Title 5, United States Code?

56. Has the Parole Board engaged in Rule Making as required by sec. 1003, of Title 5, United States Code?

57. In these cases, has the Parole Board made any effort to comply with sec. 1004, Title 5, United States Code?

58. Have these parolees petitioned the Parole Board for rule making and declaratory judgment under the pro-

visions of the Administrative Procedure Act as shown by copy of petition appended hereto?

59. What is the finding or action of the Board on this petition, and what are the grounds for the action or failure to act on this petition?

60. Is it a fact that these parolees have requested, and the Parole Board has denied, the right to be accompanied, represented and advised by counsel in the matter of hearings before the Parole Board on the question as to whether or not there has been a violation of parole?

61. Has the Parole Board made any effort to comply with sec. 1006, Chapter 5, United States Code as to Hearings?

62. Is it not true that a so-called hearing, as to the cases [fol. 374] of Compagna and Gioe, was held in the Penitentiary at Atlanta by two members of the Parole Board, George Killinger and B. J. Monkeiwicz, in which hearing the parolees were denied the right of counsel, and the usual requirements as to due process, and that no effort was made to comply with the Administrative Procedure Act?

63. Is it not true that the Parole Board has refused, although requested, to postpone the effective date of the action taken in committing these parolees as required by sec. 1006 (d), Title 5, United States Code?

64. Have the members of the Parole Board who conducted the hearing of September 8, 1948, in Atlanta, made a decision and if so what is that decision?

65. Has the Parole Board made a finding and if so what are the reasons and basis therefore upon all material issues of fact, law and discretion presented on the record and what is the appropriate rule, order, sanction, relief or denial thereof? If no finding has been made please state when we may expect a finding and reasons for delay.

66. Is it not true that these parolees have requested a transcript of the hearing of September 8, 1948, and have offered to pay for the same, and that the Parole Board has refused to furnish same?

67. Give a summary of the evidence upon which it is claimed that there has been a violation of parole?

68. Will you please produce and make a part of this deposition a complete copy of the record of the Parole Board as to the matters here involved?

[fol. 375] Interrogatories Propounded to William Bioff

69. When you appeared before the Grand Jury in New York in the matter which resulted in the indictment of Louis Compagna, et al., in No. C 114-101, did you testify in the same manner as you did on the trial of this case before Judge Bright, particularly to the effect that the conspiracy was formed in Illinois?

70. Is your testimony given before Judge Bright in this case correctly reported in the printed record on file in the Circuit Court of Appeals in *United States* v. *Compagna* reported in 146 F^2 524, particularly as to your testimony concerning the first meetings of the parties and the formation of the conspiracy in Illinois?

71. Was a prosecuting officer representing the Government present when you gave your testimony before the Grand Jury?

72. Had you told the prosecuting officers, representing the Government in this case, the substance of your testimony before you appeared before the Grand Jury?

73. From the time that you decided to tell your story to the Government prosecuting authorities, has it always been the same as to the facts testified to by you concerning the first meetings of the parties and the formation of the conspiracy in Illinois?

74. Have you ever told the prosecuting authorities in this case any different version than that shown by the printed record of the trial before Judge Bright, particularly as to when and where the conspiracy was formed in Illinois?

[fol. 376] Interrogatories Propounded to George E. Brown

75. When you appeared before the Grand Jury in New York in the matter which resulted in the indictment of Louis Compagna, et al., in No. C 114-101, did you testify in the same manner as you did on the trial of this case before Judge Bright, particularly to the effect that the conspiracy was formed in Illinois?

76. Is your testimony given before Judge Bright in this case correctly reported in the printed record on file in the Circuit Court of Appeals in *United States* v. *Compagna* reported in 146 F 2 524, particularly as to your testimony concerning the first meetings of the parties and the formation of the conspiracy in Illinois?

77. Was a prosecuting officer representing the Government present when you gave your testimony before the Grand Jury?

78. Had you told the prosecuting officers representing the Government in this case, the substance of your testimony before you appeared before the Grand Jury?

79. From the time that you decided to tell your story to the Government prosecuting authorities, has it always been the same as to the facts testified to by you concerning the first meetings of the parties and the formation of the conspiracy in Illinois?

80. Have you ever told the prosecuting authorities in this case any different version than that shown by the printed record of the trial before Judge Bright, particularly as to when and where the conspiracy was formed in Illinois?

[fol. 377] INTERROGATORIES PROPOUNDED TO WILLIAM SWERDTFEGER

81. Please state your connection with the tax case involving Frank Nitto, who was one of the defendants in indictment No. C 114-101 affirmed in *United States* v. *Compagna*, 146 F 2 524.

82. Has the direct testimony of the witnesses, Austin C. Keough, Samuel Carlisle, Albert Warner, George Morgenroth, James A. Flaherty, Hugh J. Strong, John Balaban, Elmer C. Upton, and Morris G. Leonard, been correctly reported in the transcripts made by the Alderson Reporting Company here shown to you and made a part hereof?

83. Is is true that you, as a representative of the Government in this tax case, took the position and endeavored to prove by these witnesses, and Bioff and Browne, that the money paid by the victims in the movie industry was paid in the form of a bribe to Bioff and

Browne, or for services rendered by Bioff and Browne to the movie people?

84. Did you not know that these very same witnesses were used in the Criminal prosecution in New York in the indictment above mentioned, and that the position of the Government was at that time that the money was paid as a result of extortion?

85. Do you not agree that both positions taken by the Government cannot be true? The money was paid as a result of extortion or as a bribe?

86. Do you not agree that one of these two positions must be false?

[fol. 378] 87. Which position, taken by Government in these cases is false in your opinion?

88. You are at liberty to give reasons for your answer to the last question.

[fol. 379] APPENDIX

To the United States Board of Parole:

PETITION OF LOUIS COMPAGNA, PAUL DE LUCIA, CHARLES GIOE

1. Your petitioners Louis Compagna, Paul De Lucia and Charles Gioe respectfully petition your Board for relief, for rule making and declaratory judgement under the provisions of the Administrative Procedure Act.

2. Your petitioners pray that rules be established and published in conformity with said Act.

3. Your petitioners request that the various petitions filed in various courts be made a part thereof. Printed copies of said petitions having been furnished the Board from time to time.

4. Your petitioners state that under the rules of the Parole Board and its established practice, no provision is made for a hearing of any kind in the matter or issuance of a warrant. The warrants against your petitioners were issued without any hearing. It is alleged that they were issued arbitrarily without cause or basis and are void. The Board has provided no method by which the action

of a Board Member might be reviewed within the Board; There is no method suggested in the rules or practice of the Board providing for judicial review relative to warrants. The warrant is in fact and effect a commitment.

[fol. 380] 5. It is alleged that, and the Board is requested to find that, the action of the Parole Board in the cases of your petitioners has been:

(1) arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege and immunity;

(3) in excess of statutory jurisdiction, authority, and limitations and short of statutory right;

(4) without observance of procedure required by law;

(5) unsupported by substantial evidence;

(6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing board.

6. The agency action has been unreasonably delayed.

7. Your petitioners request a finding as to whether or not these allegations are correct.

8. There is no method or procedure provided by the rules or the practice of the Parole Board, known to your petitioners, by which a parolee may be granted his liberty under parole supervision, or on bail, pending determination, after a warrant is issued and served. The agency has failed to preserve the status quo as required by the Act in these cases.

9. Your petitioners pray for relief as follows:

a. That the Board declare the New York judgment void and that the Parole Board has no power to take any action thereon for lack of jurisdiction.

b. That the Board declare the warrants void as having been issued contrary to law.

[fol. 381] c. In the alternative, that the Board grant such interim relief as may be deemed just and proper pending further action by the Parole Board. This relief may take

the form of a bond to be approved by this board conditioned upon appearance in any hearing conducted by the Board or the Board may withhold action on the warrant and to permit your petitioners to remain on parole until further order of the Board.

d. That the Parole Board promptly cause the return of your petitioners, other than DeLucia, to the Northern District of Illinois.

e. That the Parole Board grant your petitioners a hearing in compliance with the requirements of the Administrative Procedure Act. This hearing to be public and to include the following:

f. That the Parole Board conduct the hearing in the Northern District of Illinois.

g. The benefit of counsel at all stages of the proceeding, including those preliminary to the hearing.

h. A specification of the charges or outline of the evidence upon which the warrant was issued and said to be reliable by the member signing the warrant. This to be furnished in advance of the hearing in order to give the parolees an opportunity to prepare.

i. If there is to be any attempt to revoke the parole on the grounds that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole, petitioners request a statement to that effect with a specification of the reasons.

[fol. 382] j. Designation in advance of the time and place of the intended hearing in order that petitioners may present their witnesses.

k. The privilege of confronting any witnesses who claim to know of any violation and to hear their testimony and to cross-examine.

l. The opportunity and permission to produce witnesses.

m. Permission to have counsel present at all stages of the hearing and to have the benefit of representation by counsel.

n. Permission to have present at all stages of the hearing a court reporter to be selected and paid by petitioners,

or that the Board require the presence of a court reporter and furnish petitioners, at the expense of you- petitioners, with a transcript.

o. Notification of the action of the Board together with a copy of any findings made or orders entered.

p. A copy of the rules of the Board or such regulations as may be said to govern or bear upon the matter of the hearing.

q. That the Board furnish you- petitioners, at the expense of your petitioners a transcript of the administrative record made in these matters.

r. That the Board make a finding as to the charge made in each warrant and that the Board hold that there has been no violation of parole or in the alternative, your petitioners pray that a final judgment be entered bringing to an end [fol. 383] the administrative proceedings in whatever way and manner is deemed proper by the Board in order that your petitioners may secure prompt judicial review of such final action.

Louis Compagna, Paul De Lucia, Charles Gioe, by Wm. Scott Stewart, Attorney for Petitioners.

[fol. 384] PETITIONER'S EXHIBIT No. 4

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

In the matter of LOUIS COMPAGNA, et al., Relators,

vs.

W. H. HIATT, Warden

Before the Honorable E. Marvin Underwood, District Judge

The deposition of William Schwerdtfeger, taken on behalf of the Relators, in the above entitled case, before Leon M. Golding, a Notary Public of Cook County, Illinois, on the 18th day of October A. D., 1948, at Room 801, 10 Clark Street, Chicago, Illinois, pursuant to subpoena.

Present: Mr. William Scott Stewart, Attorney for Relators.

WILLIAM SCHWERDTFEGER was called as a witness, and being first duly sworn, testified as follows:

Examination.

By Mr. Stewart:

Q. Please state your name.

A. William Schwerdtfeger.

[fol. 385] Q. And your address?

A. 1300 Board of Trade Building, Chicago 4, Illinois.

Q. What is your position?

A. I am special attorney for the Bureau of Internal Revenue.

Q. Where were you admitted to the bar?

A. In Ohio. I am also a member of the bar in Illinois.

Q. Please state your connection with the tax case involved in Frank Nitto, who was one of the defendants in Indictment No. C 114-101 and affirmed in United States versus Compagna, 146 Federal Second, 524.

A. In the case of the estate of Frank Nitto versus Commissioner, tried before the Tax Court of the United States, beginning on September 30, 1948, I represented the respondent, that is, the Commissioner of Internal Revenue.

Q. Has the direct testimony of the witnesses, Austin C. Keough, Samuel Carlisle, Albert Warner, George Morgenroth, James A. Flaherty, Hugh J. Strong, John Balaban, Elmer C. Upton, and Morris G. Leonard, been correctly reported in the transcripts made by the Alderson Reporting Company here shown to you and made a part hereof?

A. Mr. Stewart, may I ask if you have received permission from the Secretary, or the Undersecretary, or Assistant Secretary of the Treasury, or the Commissioner of Internal Revenue, authorizing me to testify in that connection?

[fol. 386] Q. I have not, and I have not applied for any such permission.

A. In the absence of said permission, I feel, based upon Paragraph 3 of Department Circular 591, found at 1938-2, Cumulative Bulletin, Page 495, that I must decline to answer the question.

Q. Will you be good enough to read the section you rely upon?

A. "Treasury Department Officers and employees are prohibited from testifying in court or otherwise with respect

to information obtained as the result of their official capacities without the prior approval of the Secretary, the Under Secretary, Assistant Secretary, Administrative Assistant to the Secretary, or the head of the bureau office or division of the department in which such officer or employee is employed. An affidavit by the litigant or his attorney setting forth the interest of the litigant and the information with respect to which the testimony of such officer or employee is desired, must be submitted before permission to testify will be granted. Permission to testify will in all cases be limited to the information set forth in the affidavit, or to such portions thereof as may be deemed proper."

Q. Now, is it your understanding that you are a Treasury Department officer or employee and that these questions are with respect to information obtained as the result of your official capacity?

A. It is.

Q. I take it that you have read over the questions which I have printed and numbered 82 to 88, inclusive, on page 12 of this printed set of interrogatories.

[fol. 387] A. Yes, sir.

Q. In order to save time and space, is it your position that if I asked you each one of these questions it would be your answer that you are prohibited from testifying by this regulation?

A. That is right.

Q. I will, however, send you a copy of this deposition and if you find any corrections, you might notify the reporter.

A. Very well. I thank you.

Mr. Stewart: It is agreed between counsel and the witness that the signature of the witness to the deposition is waived.

[fol. 388] AFFIDAVIT OF LEON M. GOLDING

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

STATE OF ILLINOIS,
County of Cook, ss:

I, Leon M. Golding, a notary public in and for the County of Cook and State of Illinois, do hereby certify that the foregoing deposition of William Schwerdtfeger was taken on

behalf of the Relators in a certain cause now pending and undetermined in the District Court of the United States, for the Northern District of Georgia, Atlanta Division, wherein Louis Compagna, et al., are Relators, and W. H. Hiatt is Warden, before me, at my office, Room 801, 10 North Clark Street, Chicago, Illinois, on the 18th day of October A. D., 1948, at 1:00 o'clock p. m.; that Mr. William Scott Stewart was present on behalf of the Relators, and no one on behalf of the Warden during the taking of said deposition; that the said witness was duly sworn by me before the commencement of his deposition; that by agreement of counsel for the Relators and the witness the signature to the deposition was waived; that said deposition was taken down in shorthand by me and afterward transcribed into typewriting under my direction.

I further certify that I am not connected by blood or marriage with either of the parties to this suit, nor am I a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or [fol. 389] counsel, or financially interested in the action, or interested, directly or indirectly in the matter in controversy.

In Witness Whereof I have hereunto set my hand and seal this 18th day of October A. D., 1948.

Leon M. Golding, Notary Public.

My Commission expires May 10, 1949. (Notarial Seal.)

[fol. 390] NOTARY PUBLIC'S SUBPOENA

STATE OF ILLINOIS,
Cook County, ss:

The People of the State of Illinois

To William Schwerdtfeger, 1300 Board of Trade Building, Chicago, Illinois:

You are Hereby Commanded To appear before me, a Notary Public in and for said County, at my office, No. 801 Ten North Clark Street, in the City of Chicago in said County, on Monday the 18th day of October A. D., 19—, at

— o'clock —. M., then and there to testify the truth in a suit now pending in the District Court of the United States, Northern District of Georgia, Atlanta Division, wherein Louis Compagna, et al. are relators and W. H. Hiatt, Warden and this you shall in no wise omit, under the penalty of the law.

Given under my hand, and Notarial Seal, this 13th day of October A. D., 1948.

Leon M. Golding, Notary Public.

Note: Information on back of subpoena omitted.

Note: Printed Interrogatories omitted—see Exhibit No. 3.

[fol. 391] In the District Court of the United States, Northern District of Georgia, Atlanta Division

No. 2329. Habeas Corpus

Louis Compagna, Petitioner,

versus

W. H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia, Respondent

No. 2330. Habeas Corpus

Charles Gioe, Petitioner,

versus

W. H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia, Respondent

Findings of Fact and Conclusions of Law—Filed December 4, 1948

The above cases were, by agreement of the parties, tried together because they involve identical questions of law and substantially the same facts.

These findings of fact and conclusions of law are entitled in both cases and filed therein as findings and conclusions in each case, respectively.

Petitioners, after conviction by a jury, were, on the 31st day of December, 1943, in the United States District Court

for the Southern District of New York, sentenced to terms [fol. 392] of ten years imprisonment upon an indictment charging violation of the Anti-Racketeering Act.

They were, on August 13, 1947, released on parole. They remained at large on parole until arrested on July 23, 1948 upon Parole Violator Warrants dated July 21, 1948, and signed by Judge Fred Rogers, Member of the United States Board of Parole. They were immediately thereafter returned to the Federal Penitentiary in Atlanta, Georgia.

Petitions for writ of habeas corpus were presented to this Court on behalf of both petitioners on September 2, 1948, and rules to show cause why the petitions should not be granted were issued the same day and made returnable, to meet the convenience of the parties, on September 20, 1948.

After hearing on September 20th, writs of habeas corpus were issued, returnable on an agreed date, October 25, 1948. The cases were then heard. Evidence was introduced, oral argument heard, and counsel granted, upon their request, until November 22, 1948 to file principal briefs and three days thereafter to file reply briefs.

Petitioners allege as grounds for writs of habeas corpus that the original sentences of the District Court for the Southern District of New York are void because the Court was without jurisdiction, it being claimed that the offense was not committed in New York, and because conviction was obtained by perjured testimony, known by the prosecutor to be such.

The evidence does not support these contentions and [fol. 393] they are without merit. Discharge, therefore, on these grounds is denied.

Petitioners further allege as additional grounds that their present restraint is unlawful because they are held by virtue of Parole Violator Warrants which are void because not based on reliable or any information of violation of parole, and because they have been denied, since their return to the penitentiary, the kind of hearing to which they are entitled under the law.

The statute, applicable in these cases, authorizing revocation of parole, provides that if the Board of Parole, or any member thereof, shall have reliable information that the prisoner has violated his parole, a member of the Board may issue a warrant for the retaking of the prisoner.

The authority of the Board is strictly statutory and limited by the terms of the Act. A member of the Board has no power to issue a Parole Violator Warrant except in compliance with conditions imposed by the Act. If issued without compliance, it is a nullity and arrest thereunder unlawful. A person so arrested is entitled to relief as from illegal restraint.

An express condition precedent to the issuance of a Parole Violator Warrant is that the issuing authority "have reliable information that the prisoner has violated his parole." This is in the nature of a jurisdictional requirement and may be inquired into by competent authority.

However, if there is some substantial information of a parole violation possessed by the Board member at the time he issues the warrant, a court will not inquire into the [fol. 394]reliability of the information, that is properly for the determination of the Board member in the exercise of a fair and real discretion.

But the information must be considered reliable by him and must be substantial and relate to parole violation occurring subsequent to the grant of parole, except in special circumstances not present in these cases. Otherwise the issuance of the warrants would be arbitrary or capricious, which the law never permits. In probation cases, which are analogous to parole cases, the courts have pointed this out particularly. "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." (Burns vs. U. S., 287 U. S. 216, 223). The Court of Appeals for the Fourth Circuit, also in a probation case, say: "It is not conceivable that Congress intended to confer upon the court the power to call back the defendant at any time within five years after conviction and imprison him no matter how blameless his conduct may have been during the interim, or how strictly he may have observed the terms of his probation. It follows that, whenever it is charged that a probationer has failed to follow the instructions of the court, he may not be sentenced until he has been given notice of a specific charge and an opportunity to be heard in his defense, and until the court, upon hearing, shall have judicially determined that his conduct during the probation period has not conformed to the course outlined in the order of probation." (Hollandsworth vs. U. S., 34 F. 2d 423, 428). It would seem

that Congress had in mind at least as strict rules for the governing of the Parole Board as for the courts.

[fol. 395] The crucial question here presented is—did Judge Rogers, the member of the Board who issued the warrants on July 21, 1948, have at that time any information of a parole violation?

One would think that this would be a very simple and easy fact to determine, but it has become complicated by the refusal of Judge Rogers and the other Board members to testify as to the fact or to deny petitioners' testimony that there was no violation, and by failure of respondent to show, or tender proof of, any violation or information relating to parole violation.

If the fact justified it, statement of the information acted upon would have brought a quick and easy end to the cases.

However, respondent and the Board have chosen to rely solely on their claim that the Court may not inquire into the matter, but must accept as a conclusive presumption that the warrants were based on reliable information, although the evidence adduced and unrebutted shows that there was no violation and therefore no reliable information upon which to base the warrants. Petitioners' claim seems to be supported, not only by their testimony, but also by statements made by Board members, admitted by them, before a congressional committee which was investigating the paroles, and by the refusal of the Board to even advise petitioners of the charges against them. These statements and their refusal to say what charges of parole violation were claimed or what information they had at the time the warrants were issued, appear from the very uninformative answers given to the interrogatories propounded to them by petitioners.

[fol. 396] If Judge Rogers possessed reliable information, he might have, in his discretion, either withheld or issued the warrant; but if he had no such information, there was no room for the exercise of discretion and no authority to issue the warrants. Its issuance would be a nullity and restraint thereunder unlawful.

There is a presumption of the legality of the warrant, but it is not a conclusive presumption and it has been overcome by the evidence in the case. The Court must decide the case upon the evidence before it. If as a matter of fact the Board did have information of parole violation which would support the warrant, but elected to withhold it in the face

of the positive evidence of its non-existence for technical reasons, for example, to test its jurisdiction or for other reasons, the Court can not go beyond the record and speculate what might be true or what evidence might have been offered, but must take the case as proved and decide it on the evidence adduced.

On the present record, therefore, the Court accepts as proved that no information of violation of parole was possessed by any Board member, at the time the warrants were issued, creditable affirmative evidence, to this effect having been adduced at the trial and not rebutted or denied.

The distinction must be borne in mind, that this proceeding is not an attempt to invade the jurisdiction or infringe upon the discretion of the parole Board to pass upon the question of parole violation and propriety of revocation, but it presents the legal question as to whether conditions precedent to the exercise of its jurisdiction and discretion [fol. 397] in issuing the warrants have been shown. The first proposition is a matter of discretion as to which the courts will not interfere. The second involves the question of illegal restraint into which the courts will inquire.

From the evidence in these cases and the contentions of respondent, the position taken by him and the Parole Board appears to be that when a Parole Violator Warrant is once issued by a member of the Board, even if not based on any information reliable or otherwise, the Court may not inquire into its validity, although competent evidence is offered to prove the non-existence of such information and the respondent does not deny its non-existence or offer any proof of its existence. To accept such contentions would be to deny to a person illegally restrained the protection against arbitrary and capricious acts, which the law affords every one. (Burns vs. U. S., 287 U. S. 216). No authority has been presented to support this contention. On the other hand, a statement by Mr. Justice Brandeis in the case of Bilokumsky vs. Todd. 263 U. S. 149, 153 seems to establish the contrary in the following words: "It is also true that if the Department makes a finding of an essential fact which is unsupported by evidence, the Court may intervene by the writ of habeas corpus."

This expression was made in a deportation case but the principle announced is applicable in this case.

In another deportation case the Supreme Court say: " 'It is a wholesome and necessary principle that such an

agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency [fol. 398] is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.' " (Mahler vs. Eby, 264 U. S. 32, 45, citing and quoting from Wichita R. R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 59).

Evidence of non-violation of parole was admitted over objection of respondent that the Board had not finally acted, not to justify release on the ground that there was no violation, but as evidence tending to show, along with other evidence, that Judge Rogers did not have reliable information of violation at the time he issued the warrants and that they were therefore void. It was not a question of violation of parole, but a question of possession of information by Judge Rogers. It is an attack on the validity of the warrants, not on the exclusive right of the Board to pass upon the question of parole.

The cases cited by respondent in support of his contention are cases where there was involved discretion of the Board after hearing and not an attack on the warrant of arrest prior to a hearing. In the case of Christianson vs. Zerbst (C. C. A. 10) 89 F. 2d 40, cited by respondents, the Court said: "A warrant cannot issue in the absence of any information. Its issuance without information would be capricious and without basis in law. But, when information is at hand, its reliability is a matter for the board or the member, as the case may be, to determine; and that determination is conclusive in a proceeding of this kind." This principle is not questioned, but the issue here is whether or not there was any information. The attack upon the warrant in the Christianson case was not made until after a [fol. 399] hearing and after the parole was revoked. There was positive evidence, adduced in the habeas corpus hearing, that the Board had information from a reliable source that Christianson was drinking, abusive to his family, had threatened to kill a member of the family, and was guilty of other violations. The Court held on the evidence presented that there was sufficient information to justify the issuance of the warrant and that its reliability was a matter for the Board.

In the case of Rogoway vs. Warden, (C.C.A. 9) 122 F. 2d 967, the Court held that "The issuance of the warrant for arrest was not improper for, as outlined above, the Parole Board was possessed of some information the reliability of which was within its determination," and did not hold that the warrant could issue in the absence of substantial evidence of violation.

In the Fifth Circuit cases, the attacks on the warrant were made after hearing and the revocation of parole. The Court held in Fox vs. Sanford, 123 F. 2d 334 that, "As provided by statute Fox was given a hearing before a member of the Board of Parole, and the reliability or sufficiency of the information upon which the Board acted is not a matter for determination by the courts in a proceeding for habeas corpus."

In Bowers vs. Dishong (C.C.A. 5) 103 F. 2d 464, the issue was whether or not the Parole laws applied to prisoners on parole under conditional release. The Court held that they did and that "The Board of Parole shall have the exclusive authority to issue warrants for the retaking of any United States prisoner, who has violated his parole." The validity of the Parole Violator Warrant was not in question.

[fol. 400] It will be observed that in none of the cases cited was the validity of the warrant attacked, at least not until after hearing and final revocation of parole, and not attacked, as here, upon the ground that there was no evidence at all to support the warrant.

Where a person has been arrested on an illegal warrant and has submitted without objection to a hearing properly conducted before the Parole Board, which has resulted, on substantial evidence, in finding him guilty of violating his parole and in the revocation of his parole, he will be held to have waived the defect in the warrant and the revocation will be upheld. But if the warrant is claimed to be void because illegal, and prompt objection to restraint thereunder is made, as in these cases, the Court may properly inquire into the restraint and discharge the parolee if it finds the warrant illegal. In these circumstances, a parolee need not wait indefinitely for determination of his case by the Board, but may apply to the courts for relief by writ of habeas corpus. The justice of such a rule is apparent when, as shown by this

record, petitioners have been in restraint under the Parole Violator Warrants since July 23, 1948 and the Board has stated that it could not say when a final decision in the cases would be reached, that sometimes it required several months after hearing to reach cases for final determination. Assuming that the warrants are void and the restraint illegal, this would mean that petitioners would be illegally confined for an indefin-te period without any opportunity to have the legality of their detention adjudicated.

Respondent and the Board contend that to permit the Court to pass upon the validity of the warrants at this [fol. 401] stage of the proceeding would "divest the Board of the jurisdiction committed to it by Congress," and that the Court could not even hear testimony offered to show that the Parole Violator Warrants are illegal. The Board may consider it of importance to establish a precedent that its action in the issuance of the Parole Violator Warrants was beyond the power of courts to inquire into, but in view of the fact that the Board, where a warrant is illegally issued, may at any time on reliable information, issue a new warrant based on parole violation happening at any time subsequent to the granting of the parole and before the termination of the original sentence, it would not seem to be a matter of serious inconvenience or miscarriage of justice. But be this as it may, I think to uphold such position would be to uphold an arbitrary act and not the exercise of discretion. Furthermore, the law looks upon the liberty of the citizen as a matter of very grave importance, and to claim that by an arbitrary act an agency of the Government could hold an individual in restraint for an indefinite period of time without opportunity to test its validity can not be upheld.

From the evidence in these cases, I find that the Parole Violator Warrants in question were invalid and that the restraint thereunder is illegal. This being true, the time honored relief of habeas corpus should be granted in these proceedings.

In a similar habeas corpus proceeding (United States of America, ex rel. Paul de Lucia vs. Thomas P. O'Donovan, Marshal, No. 48-C-867, pending in the United States District Court for the Northern District of Illinois),

Judge Igoe has discharged de Lucia, who was a co-defend-
[fol. 402] ant of petitioners in the New York indictment, on a writ of habeas corpus upon substantially the same facts and contentions of law as made in the present cases. The case has not yet been reported.

In view of the foregoing findings of fact and conclusions of law, it is not necessary to consider the other grounds of the petitions for writ of habeas corpus.

The Federal courts "have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty," (28 U.S.C.A. Sec. 452) and after hearing, "to dispose of the party as law and justice require." (28 U.S.C.A. Sec. 461).

Under these sections the Court may properly delay the discharge of petitioners for such reasonable time as may be necessary to allow opportunity for an appeal if desired and also to allow opportunity for the issuance of new Parole Violator Warrants, based on reliable information, should the Board or a member thereof possess or become possessed of such information and issue new warrants within the period of delay allowed. (Mahler vs. Eby, 264 U. S. 32, 46; Dawes vs. Gough (C.C.A. 5) — F. 2d —, decided November 4, 1948).

Judgments will issue in accordance with the foregoing with stay of execution of the judgment for a period of fifteen days.

This 4th day of December, 1948.

E. Marvin Underwood, United States District Judge.

[fol. 403] In United States District Court

[Title omitted]

Judgment—Filed December 4, 1948

In conformity with findings of fact and conclusions of law filed herewith, It Is Considered, Ordered and Adjudged that the writ of habeas corpus be, and hereby is, sustained, and that the respondent discharge petitioner Louis Compagna from custody at the end of fifteen (15) days from this date, unless a further supersedeas be granted by this Court, such delay being allowed to afford opportunity for appeal if desired, or in order to enable the United States

Board of Parole to issue a new parole Violator Warrant, provided said Board, or a member thereof, has, or shall become possessed of, reliable information of parole violation during such period of delay.

This 4th day of December, 1948.

E. Marvin Underwood, United States District Judge.

[fol. 404] In United States District Court

[Title omitted]

Motion to Reconsider Judgment Entered December 4, 1948—Filed December 17, 1948

Comes now W. H. Hiatt, Warden of the United States Penitentiary, Atlanta, Georgia, as respondent in this case, and by leave of court respectfully moves this Honorable Court to reconsider the judgment herein, entered and filed on December 4, 1948, upon the following grounds, to-wit:

1. That on December 16, 1948, he received through the mail from the United States Board of Parole, Washington, D. C., a "Certificate of Revocation" which recites that the said Board has taken action by revoking the parole of Louis Compagna and directing that he serve the remainder of the sentence originally imposed as provided by law. A photostatic copy of the said "Certificate of Revocation" is attached and made a part hereof as Exhibit A.

2. That the respondent has caused the said "Certificate of Revocation" to be reflected upon the records of the United States Penitentiary, Atlanta, Georgia, and

3. That he, the respondent, now holds the said Louis Compagna in custody upon the basis of the official revocation of parole, as witness the said "Certificate of Revocation," to complete service of the sentence originally imposed as required by law,

[fol. 405] Wherefore, the respondent prays that this Honorable Court

(A) Reconsider the Judgment entered and filed in this cause on December 4, 1948, which sustained the writ of

habeas corpus and ordered the respondent to discharge the petitioner Louis Compagna from his custody at the end of fifteen (15) days from the said date in the absence of a further supersedeas, and

(B) Discharge the writ heretofore granted and remand the petitioner Louis Compagna to the custody of the respondent for service of the remainder of the term for which he was sentenced, as provided by Section 4207, Title 18, as amended, effective September 1, 1948.

Respectfully submitted, W. H. Hiatt (Warden), Respondent. J. Ellis Mundy, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney, A. E. Gottshall, Attorney, Department of Justice, Counsel for Respondent.

Note: Service omitted.

[fol. 406] EXHIBIT "A"

Department of Justice

United States Board of Parole

Washington

Certificate of Revocation

In re: Louis Compagna

Reg. No. 63773-A

To Warden or Superintendent:

The United States Board of Parole has heard the case of the above-named prisoner in the matter of violation of parole, and on the date of this certificate has ordered that the parole heretofore granted (or imposed by Public, No. 210, 72d Cong.) be revoked, and that this prisoner serve the remainder of his sentence originally imposed, as is provided by law.

In witness whereof this certificate bearing the seal of the United States Board of Parole is issued.

Walter K. Urich, Parole Executive.

Date December 14, 1948.
(Seal.)

[fol. 407] In United States District Court

Order to Show Cause—Filed December 17, 1948

Motion by the Respondent for Reconsideration of the Judgment entered and filed in the above proceeding on December 4, 1948, having been presented, read and considered, it is

Ordered that the same be filed, and that the Petitioner show cause before me on the 20th day of December, 1948, at 10:00 A. M. why the motion should not be granted.

This 17th day of December, 1948.

E. Marvin Underwood, United States District Judge.

[fol. 408] In United States District Court

[Title omitted]

Order Denying Motions for Reconsideration of Judgments —Filed December 20, 1948

The above motions came on for hearing on this day upon rules issued December 17, 1948, and counsel were heard. Counsel advised the Court that they did not desire to present further evidence or argument.

On December 4, 1948, judgments in the habeas corpus proceedings were entered discharging petitioners from custody. The judgments were final, but execution of them was stayed for fifteen (15) days for two purposes only—to allow time for appeal or for issuance by the Parole Board of valid Parole Violator Warrants. Neither action was taken.

These motions request reconsideration of the judgments for the sole reason that the Parole Board has now revoked the paroles, such action having been taken on December 16, 1948.

On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the members of the Board declined to even state what violations of the parole were charged and indicated that no hearings would be granted petitioner other than the "appearances" they had had be-

fore the Board. These "appearances" fall far short of the fair hearing which the law contemplates.

If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met [fol. 409] with anything but silence similar to that encountered at the hearings already had and nothing would be gained.

The revocations of parole were based on illegal Parole Violator Warrants and were issued without fair hearings and in my opinion are invalid.

The motions are denied.

This December 20, 1948.

E. Marvin Underwood, United States District Judge.

[fol. 410] In United States District Court

[Title omitted]

Application for Enlargement Upon Recognizance

To the Honorable E. Marvin Underwood, Judge of the United States District Court, Northern District of Georgia:

The petition of Louis Compagna respectfully shows:

1

On December 4, 1948, in the opinion and judgment in this case sustaining the writ of Habeas Corpus, it was provided:

> "It is considered, ordered and adjudged that the writ of habeas corpus be, and hereby is, sustained, and that respondent discharge petitioner Louis Compagna from custody at the end of fifteen (15) days from this date, unless a further supersedeas be granted by this Court, such delay being allowed to afford opportunity for appeal if desired, or in order to enable the United States Board of Parole to issue a new Parole Violator Warrant, provided said Board, or a member thereof,

has, or shall become possessed of, reliable information of parole violation during such period of delay.

This 4th day of December, 1948.

E. Marvin Underwood, United States District Judge."

2

The respondent, W. H. Hiatt, Warden of the United States Penitentiary, Atlanta, Georgia, has signified his in-
[fol. 411] tention to take, filed in this case an appeal to the United States Court of Appeals for the Fifth Circuit on December.

3

Pursuant to Rule 33 of the United States Court of Appeals for the Fifth Circuit, Louis Compagna, the petitioner and appellee, hereby applies for enlargement upon recognizance in the amount of Five Thousand ($5,000.00) Dollars cash.

Wherefore, petitioner applies for an order for an enlargement upon recognizance as indicated above.

Wm. Scott Stewart, M. Neil Andrews, Member of the Firm of Andrew & Nall, Attorneys for Petitioner.

[fol. 412] In United States District Court

[Title omitted]

Order on Application for Bail Pending Appeal

In Re Louis Compagna

An appeal having been taken to the United States Court of Appeals for the Fifth Circuit in the above matter, and application having been made to the undersigned Judge of the United States District Court for the Northern District of Georgia, for bail pending appeal, upon considering the application, the Government consenting thereto.

It Is Ordered that bail be granted and fixed at the sum of Five Thousand ($5,000.00) Dollars, the bond being conditioned to appear to answer the judgment of the said Court of Appeals in the above stated matter.

It Is Further Ordered that the sum of Five Thousand ($5,000.00) Dollars may be deposited in lieu of surety and the bond be approved by and before the United States Commissioner for the Atlanta Division, United States District Court for the Northern District of Georgia.

This the 20th day of December, 1948.

E. Marvin Underwood, United States District Judge.

Consented to by Harvey H. Tysinger, Asst. U. S. Attorney.

Filed Dec. 20, 1948.

Note: Order and bond of Charles Gioe omitted, being the same as the order and bond pertaining to Louis Compagna.

[fol. 413] In United States District Court

[Title omitted]

Bond on Appeal—Filed December 20, 1948

Know All Men by These Presents that I, Louis Compagna, Principal, am held firmly bound unto the United States in the sum of Five Thousand ($5,000.00) Dollars, to be paid to the United States, to which payment well and truly to be made I bind myself, my heirs, executors and administrators jointly and severally by these presents.

Signed, sealed and dated this 20th day of December, 1948.

Whereas, lately William H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia, has signified his intention to take an appeal to the United States Court of Appeals for the Fifth Circuit in the above stated habeas corpus proceeding and application having been made by the petitioner, Louis Compagna, for enlargement upon cash bond pending the action of the said Court of Appeals in said proceeding, and the court, pursuant to agreement of the parties, having entered an order fixing the bond at Five Thousand ($5,000.00) Dollars in cash, the bond to be conditioned to appear to answer the judgment of said Court of Appeals in the above stated matter:

Now the condition of this obligation is such that if the said Louis Compagna shall obey all orders made by the United States Court of Appeals for the Fifth Circuit in said cause and shall surrender himself in execution of any judgment that may be entered by the said United States Court of Appeals then this obligation to be void, else to remain in full force virtue and effect.

[fol. 414] Given under the hand and seal of the undersigned.

Louis Compagna, Principal. (Seal.)

Signed, Sealed and Executed as to Principal Before Me on the 20th Day of December, 1948. Frank A. Holden, United States Commissioner.

I approve the sufficiency and suitability of the said bond, and acknowledge receipt of said sum of Five Thousand ($5,000.00) Dollars.

Frank A. Holden, U. S. Commissioner at Atlanta, Georgia. (Seal.)

[fol. 415] In the District Court of the United States for the Northern District of Georgia, Atlanta Division

No. 2329. Habeas Corpus

Louis Compagna, Petitioner,

vs.

W. H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia, Respondent

No. 2330. Habeas Corpus

Charles Gioe, Petitioner,

vs.

W. H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia, Respondent

Notice of Appeal—Filed December 20, 1948

Notice is hereby given, with the authority of the Attorney General of the United States, that William H. Hiatt, Warden

of the United States Penitentiary, Atlanta, Georgia, as respondent in the above entitled proceedings, and Louis Compagna and Charles Gioe, as petitioners, appeal to the Fifth Circuit Court of Appeals of the United States from the Opinion and Order sustaining the Writ of Habeas Corpus entered December 4, 1948, and Order overruling the Motion [fol. 416] for reconsideration of judgment entered December 20, 1948.

This 20th day of December, 1948.

J. Ellis Mundy, United States Attorney; Harvey H. Tysinger, Assistant United States Attorney; A. E. Gottshall, Attorney, Department of Justice.

Note: Service omitted.

[fol. 417] In the United States District Court for the Northern District of Georgia, Atlanta Division

[Title omitted]

Statement of Points Relied Upon on Appeal—Filed February 14, 1948

The respondent-appellant, by counsel, will rely upon the following points on appeal:

1. The Court erred in assuming jurisdiction of the causes of action set forth in the petition for the writ of habeas corpus.

2. The Court erred in sanctioning prosecution of a collateral attack upon the warrant issued by the United States Board of Parole before the statutory administrative functions of the Board had been completed.

3. The Court erred in permitting and admitting testimony by petitioner in support of the allegation that conditions of parole had not been violated.

4. The Court erred in overruling respondent's objections to petitioner's testimony.

5. The Court erred in concluding that the conditions of parole had not been violated and that the parole violator warrant was void as not issued upon reliable information.

6. The Court erred in its finding that the Board of Parole refused to advise petitioner of the charges underlying the parole violator warrant.

7. The Court erred in sustaining the writ of habeas corpus and ordering the petitioner discharged from custody.

[fol. 418] 8. The Court erred in denying respondent-appellant's Motion for Reconsideration of the Judgment sustaining the writ of habeas corpus.

J. Ellis Mundy, United States Attorney, Harvey H. Tysinger, Assistant United States Attorney, A. E. Gottshall, Attorney, Department of Justice, Attorneys for Respondent.

[fol. 419] IN UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed February 14, 1949

The Clerk will certify and prepare the following as the record on appeal in this cause:

1. Petition for writ of habeas corpus and exhibits filed therewith.
2. Order to show cause why writ should not be granted, returnable September 20, 1948.
3. Order granting writ and fixing hearing thereon for October 25, 1948.
4. Transcript of proceedings had on September 27 and 28, 1948.
5. Respondent's return to order to show cause and all Exhibits filed therewith.
6. Order directing respondent's return to be filed and granting petitioner 7 days to traverse said return.
7. Respondent's Amendment to return to the order to show cause and Order directing same to be filed.
8. Petitioner's Traverse to Respondent's return.
9. Petitioner's first Amendment to petition.
10. Transcript of proceedings had on October 25 and 26, 1948.
11. Petitioner's Interrogatories to the Board of Parole members and others and answers thereto.

16. Opinion and Judgment by the Court filed December 4, 1948.

[fol. 420] 17. Respondent's Motion to reconsider judgment entered December 4, 1948, with Exhibit A as part thereof.

18. Order directing Motion to reconsider be filed.

20. Memorandum by the Court and Order denying Motion for Reconsideration of Judgment entered December 20, 1948.

21. Notice of Appeal filed December 20, 1948, together with proof of service.

22. Order discharging petitioner from custody upon $5000 bond pending outcome of appeal.

23. Statement of Points Relied upon on appeal.

24. Order Extending date for filing record with Clerk of Circuit Court of Appeals by 20 days, entered January 24, 1949.

25. This Designation, together with proof of service.

J. Ellis Mundy, United States Attorney, Harvey H. Tysinger, Assistant United States Attorney, A. E. Gottshall, Attorney, Department of Justice, Attorneys for Respondent.

[fol. 421] In United States District Court

[Title omitted]

Order to Forward Original Exhibits to the United States Court of Appeals for the Fifth Circuit—Filed March 2, 1949

It being represented to the Court that appellant's designation of record on appeal in the above case includes five volumes of the printed transcript of record, of trial, in the Southern District of New York, case 114-101 and one volume of hearings before a subcommittee, House of Representatives, Eightieth Congress, all of which would require considerable time to copy and at great expense—

It Is Therefore Ordered that the Clerk forward the original volumes to the United States Court of Appeals for the Fifth Circuit along with the transcript of other parts of the record as designated.

This 2nd day of March, 1949.

E. Marvin Underwood, United States District Judge.

[fol. 422] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 423] In United States District Court

Appellee's Designation of Additional Portions of the Record, Proceedings and Evidence—Filed March 10, 1949

In addition to the matters and things designated by appellant in his designation of February 14, 1949 (served on appellees on March 1, 1949), appellees request the Clerk to prepare and certify the following additional portions of the Record:

1. The testimony before a Sub-Committee of The Committee on Expenditures in the Executive Department, House of Representatives, Eighteth Congress, to wit:

Harry A. Ash
Louis Compagna
Philip D'Andrea
Paul DeLucia
Charles W. Fisher
Charles Gioe
Dr. Walter Lawrence
Daniel M. Lyons
Joseph Monkiewicz
Louis Pelton
Fred S. Rogers
Walter K. Urich
Joseph G. Colosimo

[fol. 424] (S.) Wm. Scott Stewart, 77 W. Washington St., Chicago, Illinois. (S.) M. Neil Andrews, Member of the firm of Andrews & Nall, Attorneys for Appellee, 404-22 Marietta St. Bldg., Atlanta, Georgia.

Received a copy of the above Designation, this 10 day of March, 1949.

J. Ellis Mundy, United States Attorney. Harvey H. Tysinger, Assistant U. S. Attorney.

[fol. 425] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 426] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12715

WILLIAM H. HIATT, Warden United States Penitentiary, Atlanta, Georgia, Appellant,

vs.

LOUIS COMPAGNA and CHARLES GIOE, Appellees

Appeal from the United States District Court for the Northern District of Georgia

Honorable E. Marvin Underwood, Judge Presiding

MOTION TO DISMISS—Filed September 21, 1949

Now come Louis Compagna and Charles Gioe appellees in the above entitled cause, pursuant to notice, and move to dismiss this appeal for the reason of this case has become moot. By reason of subsequent events, herein shown by affidavit, no real controversy exists between the parties. Nothing could be gained by further prosecution of this appeal as is shown by the authorities submitted herewith.

Louis Compagna, Charles Gioe.

M. Neil Andrews, Wm. Scott Stewart, Counsel for Appellees.

[fol. 427] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

AFFIDAVIT OF COUNSEL

Wm. Scott Stewart, counsel for Louis Compagna and Charles Gioe appellees in the above entitled cause being first sworn states that the above appeal taken by the Government seeks to reverse the action of the trial judge in discharging these appellees by virtue of a petition for the writ of habeas corpus.

As appears from the record herein Compagna and Gioe were arrested in Chicago, Illinois, upon warrants issued by

the United States Board of Parole. They were returned to Atlanta Penitentiary as parole violators. While in prison [fol. 428] they filed this writ before Judge Underwood. After a hearing the District Court decided that the warrant was void. *Hiatt* v. *Compagna*, 82 Fed. Supp. 295.

During the time that Compagna and Gioe were lodged in the penitentiary under the warrants they were regarded and treated as convicts in the service of their original sentences.

After they were discharged by Judge Underwood they returned to their respective homes in the Chicago district and reported themselves to the local parole authorities. They were informed that no reports were to be required.

Subsequently the Parole Board reconsidered the matter and ordered that Compagna and Gioe resume the status of parolees. Each parolee received the following letter:

UNITED STATES DISTRICT COURT

Office of the Probation Officer

Northern District of Illinois

April 4, 1949

I am in receipt of a letter from Mr. George G. Killinger Chairman, U. S. Board of Parole, advising that after considering the matter for some time with reference to your parole status since your release, the board has come to the conclusion that you are regarded as in the parole status and that monthly reports be required.

In your case it will be necessary to bring your reports up to date from June 16, 1948 to March 1, 1949.

Would suggest that you get in touch with * * * your probation officer upon receipt of this letter, so there will be no delay in submitting your reports in compliance with the request of the Parole Board. These reports must be in Washington not later than April 8, 1949.

Very truly yours, (Signed) Charles W. Fisher,
Chief U. S. Probation Officer.

[fol. 429] After the order of the Parole Board, Compagna and Gioe complied by submitting the required reports. Such reports have been approved and accepted. Appellees have complied with the rules and regulations and have accepted

the status so imposed upon them since their discharge by Judge Underwood.

Therefore the fact is that there has been a change of custody since this appeal was perfected. Appellees are no longer in the custody of appellant. No real controversy exists between the parties and this case has become moot.

Wm. Scott Stewart.

STATE OF ILLINOIS,
County of Cook, ss.

Subscribed and sworn to before me September 2, 1949. Patricia Wise, Notary Public. (Seal.)

[fol. 430] SUGGESTIONS

I

The proceedings for review of an order or judgment in a habeas corpus proceeding may be dismissed if ground therefor appears.

39 C.J.S., Sec. 118, p. 730.

Citing among others *Adams* v. *Clark*, 100 F. 2d 135.

II

Frequently an appeal is dismissed on the ground that the only questions involved are or have become moot or academic. * * *

39 C.J.S., Sec. 118, p. 730.

III

Where a reversal would not be effectual nor beneficial to the complaining party, the judgment of the trial court may be affirmed.

5 C.J.S., Sec. 1852, p. 1336.

IV

Notwithstanding an irregularity in the proceedings in the lower court, the judgment may be affirmed where, by reason of the happening of subsequent events, no real controversy any longer exists between the parties and, on account of the questions involved having become abstract, a new trial would be of no advantage to appellant or plaintiff in error.

5 C.J.S., Sec. 1852, p. 1337.

[fol. 431] V

"On a habeas corpus, where the personal liberty of the citizen is involved, our decision should be made upon the actual status of the case. This record discloses that the term of the second sentence of the appellee has expired, and, although he did not service the full period of his imprisonment by reason of his discharge by the court below, the time which he lawfully should have served has now expired. To direct a reversal of the order of the court below would be to do a vain thing. • • •

The only formal order we can now enter is an order dismissing the appeal, in view of the expiration of the second sentence of the appellee pending the consideration of this appeal by this court. *United States* v. *Mills*, 11 App. D. C. 510, 511.

As the appeal must be dismissed, it is now so ordered.

Harris v. *Lang*, 7 L.R.A. (N.S.) 124, 132, 27 App. D. C. 84, 93, 7 Ann. Cas. 141.

VI

In habeas corpus proceeding by prisoner against penitentiary warden, wherein prisoner's sentence expired through a good time allowance pending appeal from order remanding prisoner to the custody, and prisoner was released on parole for the remainder of his maximum sentence, appeal must be dismissed on ground that prisoner was no longer in warden's custody or control.

Van Meter v. *Sanford*, 99 F. 2d 511.

[fol. 432] VII

Where petitioner had been discharged from custody after appeal from order denying petition for writ of habeas corpus was lodged in Circuit Court of Appeals, appeal was dismissed as "moot".

Odell v. *Sanford*, 128 F. 2d 616.

VIII

Where question in habeas corpus proceeding was whether, as contended by prisoner, term expired on April 2, 1941, or on January 26, 1942, as contended by warden, and appeal from order discharging writ came on for hearing on January 28, 1942, so that regardless of which contention was

correct, prisoner's term had expired and prisoner had been released from custody, appeal was rendered "moot" and would be dismissed.

Pyron v. *Squier*, 129 F. 2d 310.

IX

Where petitioner for writ of habeas corpus was granted a conditional release pending appeal from judgment denying the writ, the case became "moot" and appeal was dismissed.

Weber v. *Hunter*, 137 F. 2d 926.

X

Where petitioner was released from penitentiary because of his good conduct while his appeal from judgment denying his petition for writ of habeas corpus was pending, [fol. 433] petitioner's contention of his wrongful detention became moot and appeal was dismissed.

Bledsoe v. *Johnston*, 164 F. 2d 481.

XI

Where a prisoner is enlarged on parole after he presents his petition, the effect is to do away with any basis for the habeas corpus.

Stallings v. *Splain*, 253 U. S. 339.
Wales v. *Whitney*, 114 U. S. 564, 570.
McNalley v. *Hill*, 293 U. S. 131, 138.
Re Callicot, Federal Case No. 2,323.
Ex Parte Herrera, 137 Pac. (2) 82, 83.

Respectfully submitted, M. Neil Andrews, Wm. Scott Stewart, Counsel for Appellees.

[fol. 434] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS—Filed October 17, 1949

Now comes William H. Hiatt (Warden), appellant in the above-entitled cause, by his counsel, and moves that this honorable Court deny appellees' Motion to Dismiss this appeal as moot for reasons appearing below:

1. The discharge of the appellees from the custody of the respondent-appellant by order of the District Court was pursuant to Rule 33, Section 3, of the Rules of this Court. That rule directs that "Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding;" etc.

[fol. 435] 2. Several months after discharge from the custody of appellant the appellees were requested to submit monthly parole reports, as indicated by the affidavit of appellees' counsel (Motion to Dismiss, p. 4). Upon that ground counsel for appellees avers that "there has been a change of custody since this appeal was perfected and appellees are no longer in the custody of appellant" (p. 5), and that, therefore, this cause has become moot. Appellant replies thereto with the evident fact that his custody of the appellees terminated completely when he released them in obedience to the District Court's order discharging them from his custody. It should be apparent, therefore, that appellant's custody of appellees had completely ceased before either the appeal could be perfected or the appellees submit parole reports, and appellees status has in nowise changed.

3. The "Suggestions" (p. 6) offered by counsel for appellees in support of his averment that this cause has become moot are not in point. The statements prefacing the several citations reflect entirely different factual situations from the facts obtaining as to these appellees.

4. The appeal in this cause was taken from the District Court's order discharging appellees from the custody of the

appellant, and from the District Court's denial of appellant's motion to reconsider and reverse the order of discharge. This appeal, therefore, is unaffected by any occurrence involving appellees subsequent to their discharge from appellant's custody by court order.

[fol. 436] Wherefore, appellant, by counsel, respectfully moves this Court to deny appellees' Motion to Dismiss the pending appeal.

Respectfully submitted, J. Ellis Mundy, United States Attorney; Harvey H. Tysinger, Assistant United States Attorney; A. E. Gottshall, Attorney, Department of Justice, Counsel for Appellant.

October, 1949.

[fol. 437] ARGUMENT AND SUBMISSION

Extract from the Minutes of October 18, 1949.

No. 12715

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,

versus

LOUIS COMPAGNA AND CHARLES GIOE

On this day this cause was called, and after argument by A. E. Gottshall, Esq., Attorney, Department of Justice, for Appellant, and William Scott Stewart, Esq., for Appellees, was submitted to the Court.

[fol. 438] OPINION OF THE COURT AND DISSENTING OPINION OF WALLER, CIRCUIT JUDGE—Filed November 10, 1949

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12715

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia, Appellant,

versus

LOUIS COMPAGNA and CHARLES GIOE, Appellees

Appeal from the District Court of the United States for the Northern District of Georgia

(November 10, 1949)

Before Holmes, Waller, and Sibley, Circuit Judges

SIBLEY, Circuit Judge:

Appellees Compagna and Gioe were convicted, together with others, in the Southern District of New York and each received a sentence of ten years imprisonment, affirmed United States v. Compagna, et al., 146 F. 2d 524,

[fol. 439] certiorari denied, 324 U. S. 867. Having served one-third of their sentences they were placed on parole August 13, 1947. Unfavorable newspaper publicity followed, and an investigation was had by a committee of Congress of the operations of the Parole Board and particularly of this case. The Board members who granted these paroles were out of office, and the then members testified they knew of no ground to revoke them. The committee, however, reported, among other things, that the Board had agreed to take definite action by June 19, 1948, on the committee's request that these paroles be revoked. On July 21, 1948, Judge Rogers, one of the three Board members, issued warrants in the usual form reciting that "reliable information has been presented to the undersigned member of this Board that the said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice"; and ordering his arrest and return to the penitentiary. Both parolees were promptly arrested and brought to the Atlanta Penitentiary. Each on September 2, 1948, filed a lengthy application for habeas corpus, attacking the validity of their trial and sentence; and attacking the warrants issued by Judge Rogers because of the Congressional enquiry and the testimony therein of each Board member that there had been no breach of parole. The applications further alleged there had not since been any breach of parole and Judge Rogers had no reliable information of any; that the Board had appointed a hearing for September 8, 1948, but had announced no counsel would be heard. The prayers were that the Court declare the conviction and warrants to be void and the Board without jurisdiction; and alternatively that the Board be [fol. 440] ordered to return the parolees to their home in Chicago where they were arrested, and give them a hearing there according to the Administrative Procedure Act, with counsel and witnesses present and a reporter furnished by the Board or paid by applicants. The applications set out the grounds which the Board had notified each applicant would be investigated as justifying the revocation of his parole. On September 20, 1948, the applications were amended to allege that two members of the Board, not including Judge Rogers, had in Atlanta on September 8 conducted a hearing in which applicants

denied the charges made against them and were cross examined on them, a Court reporter taking notes, but that no other evidence was introduced and representation by counsel was denied, and the Board refused to comply with the Administrative Procedure Act; and that the matter was continued and referred to Washington.

The only respondent named is the Warden of the Atlanta Penitentiary, who is not a member of the Board. He answered that he was holding the applicants for habeas corpus under their original sentences, and under the warrants of Judge Rogers which he said were valid; that the Administrative Procedure Act had no application, but the parole system was a thing *sui generis*, administered by the discretion of the Board and exempt from judicial review by the language of the Administrative Procedure Act; and that the conduct of the Board is not reviewable by habeas corpus, parole being a matter of grace and not a legal right.

The responses were traversed, habeas corpus writs issued, and a full hearing was had on the two petitions [fol. 441] together. Interrogatories of like tenor were propounded to Judge Rogers, and to the other two members of the Board, one of whom was appointed since the Congressional investigation. Judge Rogers was away from home and made no answers. Chairman Killinger answered that counsel had asked to meet with the Board but had been refused because that procedure was not required by the Parole Statute and was not followed by the Board; that he was advised that the Administrative Procedure Act is inapplicable to the Board; that in reply to counsel's request he had written an exhibited letter, enclosing a copy of the Board's Rules and Regulations, and giving assurance that only conduct since parole would be considered; that the Board would be glad to confer with counsel at its office in Washington or consider any pertinent information in behalf of the parolees, but it had never been the Board's policy to admit counsel to its deliberations or when it interviews the prisoner; that the procedure of a criminal trial was not necessary to a determination of the question whether the welfare of society would be promoted by the granting, revocation, or modification of a parole. It concluded: "To sum up, it is our position that a formal hearing of the kind you seek is not provided for by the statute. We shall, however, be glad to have you

submit in writing, or in person at our headquarters, any material or information bearing on these cases." He further testified that all appearances of prisoners before the Board are stenographically reported, running into hundreds at every meeting of the Board, the notes are transcribed in Washington and each case thereafter separately considered by the Board members, so that some delay is inevitable; but that there would be no unnecessary delay [fol. 442] in deciding the cases of applicants. Several interrogatories he declined to answer, and the Board's files he refused to produce, because they involved matters then pending before the Board for decision. Board member Monkiewicz answered to the same effect. No effort was made to force further answers.

The district judge declined for want of proof to hold invalid the sentences, which were attacked as based on perjured testimony knowingly used, and on a conviction for a conspiracy as made in New York, but really made, if at all, in Chicago. Moreover, Revised Title 28, Sec. 2255, requires that such an attack be presented to the court which tried the case.

The district judge apparently thought the Administrative Procedure Act, 5 U. S. C. A. Sec. 1001, and following, has no application to the procedures of the Parole Board in granting paroles, revoking, or modifying them, though he did not expressly so rule. It has never been thought applicable by the Board or the Attorney General who appoints its members and approves its rules. The full dress procedure it requires would render it practically impossible for the Board to handle its business. A prisoner sentenced to the penitentiary is turned over by the court to the executive, namely the Attorney General, to have the sentence executed. That the term may be shortened by good conduct, or that the imprisonment may be ameliorated by serving it outside the prison walls on parole (See Anderson v. Corall, 263 U. S. 193, 196) is a legislative grace and not a thing of right. The legislature may affix such conditions and provide such administration as it will. Courts have no function, except as the statutes [fol. 443] give them power. As respects parole, the original statutes, as well as the revision now of force, bristle with discretion given the Board, and are silent about court interference. Revised Title 18, Sec. 4202, provides that certain classes of prisoners "may be re-

leased on parole". Section 4203, prescribing no sort of hearing, and leaving it to the "opinion of the Board", says "the Board may in its discretion authorize the release of such prisoner on parole", under conditions fixed "in the discretion of the Board", he remaining "in the legal custody and under the control of the Attorney General". Section 4205 provides: "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced." Section 4206 requires designated officers to execute the warrant "by taking such prisoner and returning him to the custody of the Attorney General", that is, to the prison. Section 4207 is: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof." There is nothing in the present statute, of force since September 1, 1948, requiring that the warrant be based on "reliable information" as stated in the former Title 18, Section 717. It is very evident that the whole matter of paroles is left to the informed discretion of the Board. Court action is not made a part of it. The Administrative Procedure Act, in authorizing court review of the acts of the agencies [fol. 444] which it governs, as to them excludes such action when "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 5 U. S. C. A. Sec. 1009. Certainly no review of what the Board is doing or has done can be undertaken by habeas corpus where the Board is not a party, and no such directions can be given it as these applications pray for.

The district judge, however, held that the uncontradicted testimony of the two applicants was that Judge Rogers could have had no "reliable information" of parole violation, for there was no violation, and his warrants, issued in August, 1948, were void, ignoring the change in the statute effective September 1, 1948, and that the Warden could not hold the prisoners though the Board had already interviewed them and had under advisement the revocation of their paroles. On December 4, 1948, he gave judgment for the discharge of the applicants from custody

after fifteen days, unless within that time the Board or a member becomes possessed of reliable information of parole violation during the fifteen days and a new warrant is issued.

Within the fifteen days the Board rendered an order revoking the paroles, and certification thereof was made to the Warden. He made a motion to reconsider the judgment and presented this order to the court, and asserted that he now holds custody, not under the warrants of Judge Rogers, but under the order of the Board revoking the paroles. This motion was entertained and a show-cause order granted. Without further evidence the motion was denied on the ground that, "the revocations of parole were based on illegal Parole Violator Warrants and were [fol. 445] issued without fair hearings and in my opinion are invalid." The only basis for saying there was no fair hearing is this recital in the judgment: "On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the members of the Board declined to even state what violations of the parole were charged and indicated that no hearings would be granted petitioner other than the 'appearances' they had had before the Board. These 'appearances' fall far short of the fair hearing which the law contemplates." Appeals are taken from both judgments.

1. The district judge incorrectly states that the Board declined to state what violations of parole were charged. At the time of arrest each prisoner was notified in writing of the charges, three against Compagna and five against Gioe; and each exhibited his notice in his original pleading. If the warrants were irregular, they served to bring the parolees before the Board, which has a continuous and exclusive jurisdiction over them in respect of their paroles. They knew the charges against them, and were given the "appearance" which the statute says shall be afforded them. The law does not provide for any other "hearing". Irregularity in the arrest of an alien does not invalidate deportation proceedings otherwise conformable to law. United States ex rel. Bilokumsky v. Tod, 263 U. S. 149, 158; nor in general does an unlawful arrest prevent a court from trying one on a valid charge of which it has

jurisdiction; 22 C. J. S., Criminal Law, § 144; 14 Am. Jur., Criminal Law, § 219. Parole revocation is informal and [fol. 446] discretionary, and we see no need of starting afresh with a new warrant, if after affording due "appearance" the Board is satisfied that parole ought to be revoked, and has revoked it. The warrant has become unimportant.

2. The Chairman, Dr. Killinger, was not a Board member when the Congressional enquiry was made. None of the present members had anything to do with the grant of the paroles then under enquiry. They are under no incapacity to do their duty. The Chairman by letter offered to let counsel come before the full Board in Washington and present any material or information bearing on the cases, though he declined to have a full scale trial. This was not unfair. The refusal to answer some interrogatories was due to the belief, we think well grounded, that the court had no part in the Board's deliberations about the paroles. The requirements as to procedure in the Administrative Procedure Act have no application to the Parole Board. Its procedure is fixed by a later statute, Revised Title 18, Chapter 311, Parole. We are aware that in Fleming v. Tate, 156 F. 2d 848, it was held that the statute, then 18 U. S. C. A. Sec. 719, in stating that a paroled prisoner returned to custody "shall be given an opportunity to appear before said board of parole", meant he should have an effective hearing, including assistance of counsel, and the long practice otherwise was unlawful. The decision would seem to invalidate on habeas corpus a vast number of parole revocations. Congress, in revising the parole law, Revised Title 18, Sec. 4207, changed the wording to read: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an oppor- [fol. 447] tunity to appear before the Board, a member thereof, or an examiner designated by the Board." This change cuts deeply into the idea that the appearance is to be a trial. An examiner may conduct it now, and it would seem that the taking of the testimony of the prisoner, and perhaps his witnesses, is alone contemplated. The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, following the appearance in person of the prisoners before two members of the Board who heard

and preserved the record of what they had to say, we think is a sufficient opportunity to appear. We think the district court erred in holding the orders revoking those paroles are nullities, not justifying the Warden in holding the prisoners.

3. When Anderson v. Corall, 263 U. S. 193, was decided, the Warden of a penitentiary was always a member of its board of parole, and he was specifically authorized to issue a warrant for a parole violator. He was a proper person to defend an attack on the board by habeas corpus. Under the present law the Warden has no part in parole matters, knows nothing about what the Board does in Washington, and is in no position to explain or defend its proceedings. The use of habeas corpus against the Warden to reach a wrong in the Board's procedure, if there be such, is not to be encouraged. In Bowers v. Dishong, Marshal, 103 F. 2d 464, this Court held that habeas corpus would not lie to test judicially whether parole violation had occurred. Again in Fox v. Sanford, 123 F. 2d 334, we held habeas corpus was not available to test the sufficiency of information of parole violation to justify [fol. 448] the Board's warrant. The Sixth Circuit, in United States v. Barc, 141 F. 2d 480, held that a court should not by habeas corpus interrupt the procedure by the Board which the statute prescribes. The Fourth Circuit, in United States v. Nicholson, 78 F. 2d 468, held that the remedy for the Board's failure to give a proper appearance before it is not habeas corpus, but a direct proceeding in mandamus against the Board in the District of Columbia. A similar ruling was made in United States v. Dillard, 102 F. 2d 94. If a revocation of a parole can ever be attacked collaterally by habeas corpus against the Warden, it ought to be nullified only on plain evidence and a full hearing. The district court here held that the warrant was invalid and that all that followed was void, and did not try at all the Warden's pleading presenting the orders of revocation, but hastily condemned them on the further ground that the hearing was unfair, and released the prisoners from the Warden's custody.

The judgments appealed from are reversed and the appellees are directed to be remanded to the custody of the Warden, with leave to the applicants, if so advised, to

enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held.

WALLER, Circuit Judge, dissenting:

In my study of this case the following viewpoints have developed:

1. The Appellees were lawfully paroled.

[fol. 449] 2. Between the dates of their parole and their re-arrest and reincarceration, they had committed no violation of the conditions of their parole.

3. That the Parole Board, neither at the time of the issuance of the warrant declaring the parolees to have violated the conditions of the parole and to be fugitives from justice, nor at the time of revocation of parole, had any "reliable information", or information of any kind, that the parolees had violated the conditions of parole.

4. That the provisions of the statute requiring the Board, after the issuance of a warrant and before revocation of parole, to afford parolees an opportunity to appear before the Board, were intended to require the Board to comply with the Constitutional prohibition against the deprivation of liberty without an opportunity to be heard, and the appearance allowed parolees in this case afforded no such opportunity to be heard as the law and the Constitution contemplate.

5. That one who has rightfully earned and lawfully achieved parole has a status—call it what you will—which he has the right to defend and of which he cannot be deprived except by due process of law, to be afforded either by the Board or, upon its failure, by the courts.

6. Neither adverse newspaper criticism of the granting of parole or a demand or request by a sub-committee of the Committee on Expenditures in the Executive Department of Congress can lawfully supplant the requirement of the statute for "reliable information of violation of parole".

[fol. 450] 7. That the Parole Board cannot rightfully revoke a parole lawfully granted without cause or grounds for

such revocation and the failure of the Board to acquaint either the parolees or the Court below with any grounds for the revocation of the parole should be taken as proof not only that there *were* no such grounds but also should be taken as a deprivation of liberty without due process.

8. The case must be judged by the law as it existed July 1, 1948, or at the time of the issuance of the warrants for the arrest, and not by the New Judicial Code of September 1, 1948.

9. The fact that a criminal trial may be lawful despite the fact that the defendant was taken on an invalid warrant of arrest, as analogized in the majority opinion, seems inapt here. The trial in a criminal case is on an indictment or information whereby, if conviction results, the defendant may be deprived of his liberty. It is the indictment or information that informs the defendant of the charges and what he shall be expected to meet. In a revocation of parole it is the warrant of arrest that deprives him of his liberty and that should acquaint him of the thing with which he is charged.

10. Neither newspapers, sub-committees, political repercussions, whims, or capriciousness, singly or collectively, without more, justifies the incarceration or reincarceration of an individual longer than it is reasonably necessary to afford him a full and fair hearing on charges adduced against him.

[fol. 451] 11. Notwithstanding the pronouncement of the Board to the sub-committee that it, like Pilate, found no fault in the parolees since their release, and notwithstanding the refusal of the Board members to answer interrogatories or to div*l*uge, either to the parolees or to the lower Court, any reliable information as to any violation of parole, these men have been cast back into custody from which no relief can come if the Board is above the law.

The facts, as found by the Court below, are without any contradiction in the evidence and I think that its judgment should be affirmed.

[fol. 452] JUDGMENT

Extract from the Minutes of November 10, 1949.

No. 12715

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,

versus

LOUIS COMPAGNA AND CHARLES GIOE

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in this cause, be and the same are hereby reversed; and the appellees are directed to be remanded to the custody of the Warden, with leave to the applicants, if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held.

[fol. 448] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed November 30, 1949

May it please the Court:

Your Honors have inadvertently misapprehended the record, Opinion pp. 2, 4, 9, when Your Honors assert that [fol. 449] none of the present members of the Board granted the paroles. See the transcript of the Congressional hearings.

Again Your Honors misapprehended the record when the Court said pp. 4, 8, 9, 10, that at the time of the arrest each prisoner was notified of the charges. Although the referrals were filed with the warrants in the office of the Warden they were not revealed until September 2, 1948. The correspondence between the Chairman and counsel took place in July and August. The prisoners were questioned by the Board members in prison on September 8.

The letter sent by Dr. Killinger, R. 352, and the rules of the Board, our brief p. 61, disclose that the Board assumes the power to revoke in the absence of misbehavior, upon the ground that continuation of the parole status is considered to be incompatible with the public welfare.

Your Honors have inadvertently failed to apply a correct construction of the statutes in holding that the Board is vested with such power. We again call attention to our brief p. 63, where authorities are collected to the effect that rules adopted out of harmony with the will of Congress are mere nullities. The mistake made by the Board, as to the extent of its power, is one of law and may be reviewed in habeas corpus. The erroneous holding here that the Board has such discretion is contradicted by the authorities, including *Clark* v. *Suprenant, Ex parte Urbanowicz, Fleming* v. *Tate* and *Moore* v. *White*, cited in our brief.

Your Honors have failed to follow the statutes when it is held that the warrant is unimportant. This will be seen upon another examination of the cases cited by us to the effect that the warrant is jurisdictional. See again *Moore* v. *White*, our brief p. 21.

[fol. 450] The cases cited by Your Honors were distinguished from the one at bar by Judge Underwood as pointed out in our brief, pp. 33, 34, 35.

Upon re-examination Your Honors will find no difference between the old and the new statute. Both require a violation before the Board may institute proceedings.

Your Honors inadvertently approached the question as to whether Judge Underwood should have reconsidered from the wrong viewpoint, as if the burden were upon us. Upon re-examination Your Honors will perceive that the Government was asking for a new trial. It was up to respondent to make a showing. No affidavit was submitted. No motion to amend the return. No supplemental pleading submitted. Judge Underwood exercised his discretion and based his action upon the record. Under the settled law Your Honors should not override that ruling unless the Government is able to show an abuse of discretion. In the absence of a proper showing below, the Government is in no position to do this. Really the respondent was asking for a new trial. If upon rehearing Your Honors will apply the familiar rules to such a situation it will be seen that Judge Underwood must be upheld.

Your Honors mention the fact that the Board is not a party and also refer to a case where mandamus is indicated. Upon rehearing, if Your Honors agree that the Board exceeded its powers it will be seen that habeas corpus is the proper remedy. It is traditional that the custodian must exhibit his authority in such cases.

No mention is made of our motion to dismiss. We trust that upon rehearing Your Honors will again consider our point.

If Your Honors, upon rehearing, agree with the trial [fol. 451] court, of course the judgment will be affirmed, but if it is to be remanded, we submit that the order of remand will bear further consideration. Particularly as to the burden of proof and what must be shown.

We respectfully pray for a rehearing.

Respectfully submitted, Wm. Scott Stewart, Counsel for Appellees.

A. Walton Nall, Of Counsel.

CERTIFICATE

I, Wm. Scott Stewart, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Wm. Scott Stewart, Counsel for Petitioners.

[fol. 457] Opinion and Order Denying Rehearing—Filed December 16, 1949

In the United States Court of Appeals for the Fifth Circuit

No. 12715

William H. Hiatt, Warden, U. S. Penitentiary, Atlanta, Ga., Appellant,

versus

Louis Compagna and Charles Gioe, Appellees

Appeal from the District Court of the United States for the Northern District of Georgia

(December 16, 1949)

On Motion for Rehearing

Before Holmes, Waller, and Sibley, Circuit Judges.

By the Court: The opinion of the court seems to be inaccurate in stating that no member of the present Parole Board was such when the paroles were granted, [fol. 458] Member Monkiewicz appearing to have continued as such throughout; and in stating that each prisoner was given written notice at the time of his arrest of the charges of parole violation made against him, the fact being that the written charges were formulated then, and it not appearing when they were made known to the prisoners. Each knew them on Sept. 2, 1948, six days before the hearing before the Board, and each alleged them fully in the applications then filed for habeas corpus. These inaccuracies are immaterial to the decision made.

Since neither judge who concurred in the judgment desires a rehearing, the motion therefor in the above named and numbered case is denied.

Waller, Circuit Judge, concurring in the result:

I adhere to my original dissent but agree that under our Rule 29 the motion for rehearing should be denied.

[fol. 459] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA, UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 426 to 458 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 12715, wherein William H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia is appellant, and Louis Compagna and Charles Gioe, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 425 are identical with the printed record upon which said cause was heard and decided in said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 19th day of December, A. D. 1949.

Oakley F. Dodd, Clerk of the United States Court of Appeals, Fifth Circuit. (Seal.)

[fol. 454] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 15, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

COM-DAV

JAN 12 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. [redacted] 5

LOUIS COMPAGNA and CHARLES GIOE,
Petitioners,

vs.

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Respondent.

PETITION

for certiorari to the United States Court of Appeals, Fifth Circuit and Brief in support thereof.

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Appended—Opinion of United States Court of Appeals, Opinion of District Judge. Also Opinions in Related Case Determined in the Seventh Circuit.

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THE CONSTITUTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. _____

LOUIS COMPAGNA and CHARLES GIOE,
Petitioners,

VS.

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Respondent.

PETITION

To the Honorable Fred Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

A.

Summary Statement of Matter Involved.

Your petitioners were discharged on habeas corpus by the United States District Court in Atlanta, Georgia. The Government was successful in its appeal and now petitioners seek review here. There is involved a proper construction of the parole laws.

As is stated by the United States Court of Appeals, petitioners were imprisoned by virtue of parole warrants. During the pendency of their habeas corpus proceedings, they were allowed to appear before two members of the Parole Board. The trial judge held that the warrants were void, not having been based upon any information. The warrants were said by Judge Underwood, the trial judge to have issued arbitrarily and capriciously. Instead of releasing petitioners forthwith, the trial judge continued the matter, in order to give the authorities time in which to procure new warrants, or to appeal. On the day fixed for discharge, the Government presented notice that the paroles had been revoked and requested that the matter be reconsidered. Judge Underwood, denied this motion, on the ground that the revocations were of no validity, having been based upon void warrants, in the absence of a proper hearing.

Two judges out of three in the United States Court of Appeals in reversing the trial judge, held that the warrants were of no importance. The Appeals Court held that the warrants had served their purpose when petitioners were taken into custody. Further that the trial court erred in not giving effect to the revocations. Judge Waller and the trial judge agree with us that a proper warrant is necessary under the statute to give the administrative body jurisdiction. Judge Underwood and Judge Waller are of the opinion that the so-called hearing afforded petitioners, does not measure up to the standard intended by Congress and required in due process. The majority, in the Appeals Court, in holding that the hearing was sufficient, found it necessary to expressly disregard a well reasoned decision to the contrary in another circuit.

The district judge did not believe that the Administrative Procedure Act applied. The Appeals Court held that the

Act, if applied, would render it practically impossible for the Board to handle its business. We submit that it makes no difference whether the Act applies or not. Relief should be afforded from arbitrary action under the Act as well as by virtue of the power of the courts in habeas corpus.

Petitioners moved to dismiss the appeal, which motion was supported by their affidavit showing that since their discharge they have been re-instated on parole. This motion was not passed upon by the Court of Appeals.

An attack was made upon the original sentences, based upon the claim that perjured testimony was knowingly used and that the original court lacked jurisdiction,—being without venue. It was held, in both courts below, that such attack must be presented to the court which tried the case. We contend that under the circumstances of this case, petitioners should not be delayed by resort to the relief provided under the statute by motion in the trial court.

Petitioners are two of a group of defendants convicted of conspiracy in New York. Their conviction was affirmed in *United States* v. *Compagna et al.*, 146 F. 2d. 524. Certiorari was denied here, 324 U.S. 867. After petitioners had served the required portion of their sentences and paid their fines, they were released on parole. At the same time other defendants in the same case were released on parole.

All of these men behaved themselves, and faithfully kept the conditions of parole and were allowed to remain at their respective homes under parole supervision for about a year and then upon the approach of elections, certain Congressmen undertook to embarrass the administration with an investigation. It was claimed that the paroles were obtained illegally, but the Congressmen were compelled to confess that no proof was obtainable. Pressure was exerted upon the Parole Board to return these men to prison. In

view of the fact that the Board members defended themselves and consequently were compelled to defend your petitioners the transcript of the Congressional hearings shows that there has been no violation of parole. Further that the members of the Board had no information concerning any violation. The statute requires that such information be at hand before the warrant can issue. In preparation for trial before Judge Underwood, we took the depositions of Board members in Washington. They admitted that they were correctly reported as to testimony given before the Congressional Committee, so we introduced the report into evidence. Judge Underwood based his finding that the warrant was issued in the absence of information in part upon this printed transcript of the Congressional hearings. This volume was certified as an original exhibit from the trial court to the Appeals Court and will appear as part of the record here.

D'Lucia was arrested first. Before he could be removed from Chicago, in his home district, he obtained a writ of habeas corpus. Judge Igoe discharged D'Lucia and the Court of Appeals, for the Seventh Circuit, has affirmed that judgment. The judges in the Seventh Circuit have held to the same effect as Judge Waller and Judge Underwood here, that a warrant issued arbitrarily will not support further proceedings in the administrative body. Your petitioners were unable to obtain a hearing in Chicago. After they were imprisoned in Atlanta under the warrants, and after they waited in vain for over a month for a hearing, they filed these petitions before Judge Underwood. After Judge Underwood issued the writ, but before a hearing could be had before Judge Underwood, two members of the Board met in Atlanta and called Compagna and Gioe before them. Petitioners testified, R. 178, 209 concerning the nature of the hearing afforded them by the Parole Board. The remand order gives us the

privilege of showing if we can, that the revocations are nullities. This privilege has no value if the majority is correct in its estimate of the power given the Parole Board by statute, and in the limitation prescribed upon the courts.

Judge Waller boiled the case down to short paragraphs, one of which we quote, herein p. 158:

> 11. "Notwithstanding the pronouncement of the Board to the sub-committee that it, like Pilate, found no fault in the parolees since their release, and not withstanding the refusal of the Board members to answer interrogatories or to divulge, either to the parolees or to the lower Court, any reliable information as to any violation of parole, these men have been cast back into custody from which no relief can come if the Board is above the law."

In denying our petition for rehearing, the Appeals Court filed an additional opinion to the effect that certain inaccuracies may have occurred. These were held to be immaterial. We contend that the Appeals Court did not fully comprehend the extent of the inaccuracies nor how material they happen to be.

B.

Basis of Court's Jurisdiction.

By certiorari the Supreme Court may require any cause in the United States Court of Appeals to be certified to it for determination.

Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 28 U.S.C.A. § 347, provides that "in any case . . . in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court . . . upon the petition of any party thereto . . . to require by certiorari, either before

or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted . . . appeal."

Under this statute extensive power is conferred on the Supreme Court. *Gay* v. *Ruff*, 292 U.S. 25. The purpose of this grant of power was to secure uniformity of decision and to bring up cases of importance which it is in public interest to have decided by the court of last resort. 36 C. J. S. § 204, p. 108; *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202; *Magnum Import Co.* v. *Coty*, 262 U.S. 159; *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217.

Under Supreme Court Rules, rule 38(5), 28 U.S.C.A. following § 354, a writ of certiorari may be granted where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; *Griffin* v. *McCoach*, 313 U.S. 498; *Bingham's Trust* v. *C.I.R.*, 325 U.S. 365; *Halvering* v. *Price*, 309 U.S. 409; *Ticonic Nat. Bank* v. *Sprague*, 303 U.S. 406; In *re 620 Church Street Bldg. Corp.*, 299 U.S. 24; *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U.S. 237; or has decided an important question of federal law which has not been, but should be settled by the Supreme Court. *Postal S.S. Corporation* v. *The El Iselo*, 308 U.S. 378; *Carpenter* v. *Winn*, 221 U.S. 533; *Public Service Commission of Missouri* v. *Brashear Freight Lines*, 312 U.S. 621; or has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court. *Galloway* v. *United States*, 319 U.S. 372; *Department of Treasury of State of Indiana* v. *Ingram-Richardson Mfg. Co. of Indiana*, 313 U.S. 252; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. *Aetna*

Cas. & Sur. Co. v. *Flowers*, 330 U.S. 464; *United States* v. *Rizzo*, 297 U.S. 530. *LeTulle* v. *Scofield*, 308 U.S. 415.

C.

Questions Presented.

What is the legal effect of a warrant issued arbitrarily, without any information?

What is the proper construction of the statute? Is a hearing required?

Does the Administrative Procedure Act apply?

What is the legal effect of a revocation, made in the absence of a hearing, following the execution of a void warrant?

Does the Parole Board have the right to revoke a parole in the absence of any violation, because the Board is of the opinion that continuation of the parole is not combatible with the welfare of society?

Are these matters committed, by the statute, to the discretion of the Board in such manner that they are not subject to review by the courts?

After the trial court has held parole warrants to be void and has granted discharge upon habeas corpus, is the custodian entitled to a new trial upon filing an unsupported motion, merely stating that he has received through the mail a paper indicating that the paroles have been revoked?

If upon appeal by the Government a new trial be awarded by the United States Court of Appeals, where is the burden of proof? Is it not error for the Appeals Court to require that petitioners show the total nullity of the revocation?

Should not the burden have been placed upon the warden to show that he possessed a valid revocation?

In the determination of the question as to whether there exists a valid revocation, must it be shown that a valid warrant was issued and that a hearing was afforded? What are the requirements of due process as to the warrant and the hearing?

Where prisoners are placed upon parole and retaken by warrants, held to be void, and the Government appeals, should not the appeal be dismissed, as moot, upon a showing that the prisoners were placed back on parole, pending the appeal?

Where a citizen has been transported for trial over a thousand miles from his home and he claims that the trial court had no jurisdiction because the crime, if any, was committed in his home district, and further that his conviction was the result of perjury knowingly used, must the attack be made exclusively in the district where the case was tried, or does the citizen have the right to question the validity of the judgment by habeas corpus at the place where the judgment is being enforced?

D.

Reasons for Granting Writ.

The United States Court of Appeals has decided important questions of federal law, which have not been, but should be settled by this Honorable Court.

The United States Court of Appeals has decided important questions of federal law in a way in conflict with applicable decisions of this Honorable Court and has so

far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

A conflict exists in the various Circuits in the decisions construing the parole laws. The decision of the United States Court of Appeals sought to be reviewed, directly conflicts upon a number of questions of federal law with the decision of other Courts of Appeal upon the same questions. The existence of conflict as to some of these questions, between circuits, is expressly conceded in the opinion rendered in the case at bar.

Differences of view among the various United States Courts of Appeal in the construction and application of federal statutes require the interposition by this Honorable Court by certiorari under the direct conflict rule.

Questions of the jurisdiction and procedure of federal courts are involved, where there are various conflicting decisions in the United States Courts of Appeal.

The United States Court of Appeals of three judges, one judge dissenting, reversed a decision of a single judge District Court, with the result that the case is decided by an equal division of judges within the circuit. Your Honors should review because the important questions involved have been made to appear close.

The right to relief, by habeas corpus from arbitrary action, resulting in imprisonment, on the part of government officials has been violated.

The meaning of due process as applied to the status occupied by a federal prisoner on parole should be settled by this Honorable Court.

We present a case of first impression as to whether the Administrative Procedure Act applies to the Parole Board, in the matter of revocation.

The rights of thousands of prisoners in the same position occupied by petitioners and many issues fundamental to our government are involved.

PRAYER.

Your petitioners file the record here and pray for the Writ of Certiorari and that the judgment be reversed.

LOUIS COMPAGNA,

CHARLES GIOE,
Petitioners.

A. WALTON NALL,

WM. SCOTT STEWART,
Counsel for Petitioners.

Statutes Involved

The parole statutes are set out in the opinion by Judge Igoe, herein, pp. 188, 189.

Section 4205, being the revised statute, in effect after the arrest in these cases, is set out in the opinion by Judge Sibley, herein, p. 152.

Section 10 of the Administrative Procedure Act is also set out by Judge Igoe, herein p. 191.

Section 452, Title 28. Power of Judges; place of entering order of circuit judge.

The several justices of the Supreme Court and the several judges of the Circuit Courts of Appeal and of the District Courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. (R. S. Sec. 752; Feb. 13, 1925, ch. 229; Sec. 6, 43 Stat. 940.)

Section 461, Title 28. Summary hearing; disposition of party.

The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. (R. S. Sec. 761.)

BRIEF IN SUPPORT OF PETITION

I.

Opinions Below.

The opinions rendered by the Honorable E. Marvin Underwood, District Judge, are reported in *Compagna* v. *Hiatt,* in 82 F. Supp. 295. The opinion of the United States Court of Appeals appears in the record, and has not yet been reported.

The opinion rendered by the Honorable Michael Igoe, District Judge in a companion case, *United States ex rel. DeLucia* v. *O'Donovan* is reported in 82 F. Supp. 435. The opinion of the Court of Appeals has not yet been reported. We append a copy of each of these opinions.

II.

Jurisdiction.

The judgment to be reviewed was entered November 10, 1949 and modified when the petition for rehearing was denied on December 16, 1949. Your Honors have jurisdiction by virtue of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 28 U.S.C.A. § 347 as supplemented by the rules of this Court.

III.

Specification of Errors.

The United States Court of Appeals erred in not affirming the judgment of the trial court.

The Court of Appeals erred in not dismissing the appeal as moot.

The Court of Appeals erred in holding that the trial court erred in not granting the warden a new trial. No showing having been made, and no abuse of discretion having been claimed or established.

The Court of Appeals erred in holding that the warrant was unimportant.

The Court of Appeals erred in holding that no hearing was necessary.

The Court of Appeals erred in holding that the Administrative Procedure Act did not apply.

The Court of Appeals erred in holding that the burden is upon petitioners to show that the revocation is a nullity.

The Court of Appeals erred in not holding that the motion made in the trial court by the Warden for reconsideration required a further showing and its denial should not be reversed in the absence of proof of an abuse of discretion.

The Court of Appeals erred in not holding that an exception was necessary in the trial court to preserve any point made by the Government on appeal.

The Court of Appeals erred in not holding that the

original New York judgment was void for lack of jurisdiction.

The Court of Appeals erred in holding that an attack can not be made on the original judgment by reason of the statute requiring that such attack must be made in the court in which the case was tried.

Summary of Argument

We point to direct conflict existing in the various Appeals Courts.

We endeavor to demonstrate that the Court of Appeals is in error, in holding that the parole warrants have become unimportant.

It is our contention that a valid warrant is jurisdictional and the Board must proceed according to the statute.

We endeavor to distinguish the authorities cited by the Court of Appeals, in support of its holding that the warrants are not important.

The Court of Appeals erroneously held that the revision of the parole laws demonstrates an intention upon the part of Congress to dispense with any and all standards concerning the issuance of a warrant. We demonstrate that the new law, if applicable, increases the requirements.

In our dispute, concerning the error of the Court of Appeals in holding the warrant unimportant, we refer Your Honors to the general power of the courts to inquire into the lawfulness of restraint by habeas corpus.

We demonstrate from the record that the Court of Appeals was in error in holding that petitioners were notified of the charges at the time of arrest.

We demonstrate, from the record, that the so-called hearing afforded by the Parole Board, did not comply with the statute.

We set out excerpts from the testimony of the Board members before the Congressional Committee, in order to demonstrate that the trial court was correct in holding that the warrants were issued arbitrarily.

We demonstrate, from the record, that the Board assumed the power to revoke these paroles, in the absence of any violation, and that the Court of Appeals erred, in granting such unlimited power to the Board.

We show that there could not possibly be any violation of parole concerning tax matters.

We demonstrate, from the referrals, that they are meaningless and that the vague general charges have no foundation in fact.

We set out the rule of the Board, and demonstrate that it seeks to exceed its power.

We demonstrate that the Court of Appeals has failed to recognize that petitioners are entitled to due process.

We refer to the depositions of the Board members, to demonstrate that the Board assumes powers not intended by Congress and which are not sanctioned by the courts.

We refer to the testimony of the Board members before the Congressional Committee, to demonstrate that the trial court was correct in its finding that the warrants were issued arbitrarily.

We point to the law which affords petitioners the right to a hearing, in conformity with the statute. Which right has been said by the Appeals Court to not exist.

We support the trial court in its refusal to grant a new trial and argue that the Court of Appeals erred in awarding one.

We point to the error of the Court of Appeals, in its indication that the Parole Board should have been made a party.

We demonstrate and argue that the Administrative Procedure Act should apply.

We contend that the Government appeal should have been dismissed for the reason that this cause became moot.

We contend that the remand order entered by the Appeals Court is not proper.

We contend that perjury nullified the original conviction.

We attack the original conviction upon the ground that the trial court did not have jurisdiction.

We point out the fact that the Appeals Court did not go far enough in admitting its misapprehension of the record. The mistakes were not all corrected and should have changed the result.

ARGUMENT

Direct Conflict with other Circuits

Judge Sibley said in the case at bar, herein p. 155:

> "We are aware that in *Fleming* v. *Tate*, 156 F. 2d. 848, it was held that the statute, then 18 U.S.C.A. Sec. 719, in stating that a paroled prisoner returned to custody 'shall be given an opportunity to appear before said board of parole,' meant he should have an effective hearing, including assistance of counsel, and the long practice otherwise was unlawful. The decision would seem to invalidate on habeas corpus a vast number of parole revocations."

We submit that that is equivalent to an express concession of a conflict between circuits. *Fleming* v. *Tate* was decided by the District of Columbia Court of Appeals. This Appeals Court is expressly included in the various statutes, and the rules of this Honorable Court. JUR. SUP. CT. U.S. Robertson and Kirkham, sec. 293. See also sec. 292, where a large number of authorities are cited to the effect that where the decision of the United States Court of Appeals, sought to be reviewed, by certiorari, directly conflicts on a question of federal law with the decision of another Court of Appeals upon the same question, Your Honors grant certiorari as of course, and irrespective of the importance of the question of law involved. *Helvering* v. *New York Trust Co.*, 292 U.S. 455; *United States Trust Co. of New York* v. *Commissioner of Internal Revenue*, 296 U.S. 481, 482.

We have noticed that Judge Sibley adds to the above concerning *Fleming* v. *Tate*, that a change has been brought about in the law, but we agree with Judge Waller that the

law applicable should be the one in existence at the time that the warrant was issued. Further, we submit that due process is pretty much the same under either law.

A direct conflict also exists between the case at bar and the companion case recently decided in the Seventh Circuit. Judge Sibley holds that the warrant is unimportant. Judge Lindley has correctly said that it is jurisdictional. Such holding by Judge Lindley is in conformity with *Moore* v. *White*, 23 F. 2d. 467, 8th Cir; *Christianson* v. *Zerbst*, 89 F. 2d. 40, 10th Cir; *Clark* v. *Suprenant*, 94 F. 2d. 969, 9th Cir.

Judge Lindley makes an effort to distinguish between the case at bar and the case in the Seventh Circuit, but Your Honors will readily perceive that the inaccuracies of the opinion by Judge Sibley led Judge Lindley into error. Judge Lindley concluded that Compagna and Gioe were arrested after the new law went into effect. Your Honors have the record and know different. They were arrested in July 1948. R. 172, 208.

The warrant would be unimportant, after its execution, if the Board has the power said by the Appeals Court to exist. The present decision conflicts with *Moore* v. *White*, 23 F. 2nd 467, which held that a warrant must issue to give the Board jurisdiction. The parolee in the *Moore case* was taken into custody by virtue of a telegraphic request made by the authorities in Washington.

In holding that the warrant is unimportant, the Appeals Court overlooked the fact that it has been held by respectful authority that the warrant is jurisdictional. Your Honors will perceive that in *Moore* v. *White*, 23 F. 2nd, 467, there existed a plain violation, known to the authorities. But the special agent arrested the prisoner without warrant. Upon the hearing it was proven that the violation took place,

but the evidence of the hearing could not supply the necessity of a warrant. No warrant, no jurisdiction. All of the judges, with the exception of Judge Sibley and Judge Holmes, have held that the warrants are jurisdictional.

See also *Clark* v. *Suprenant*, 94 F. 2nd. 969, and *Christian* v. *Zerbst*, 89 F. 2nd. 40; cited by Judge Lindley herein p. 167. See also the opinions of Judge Underwood and Judge Igoe, herein pp. 178, 187.

We cite other cases in conflict, during the course of this argument.

The Appeals Court failed to note the distinction between the following cases, and the case at bar.

A conflict also exists between the case at bar and several other Circuits, and in conflict with decisions of this Honorable Court upon the right to relief by habeas corpus. Judge Sibley has practically nullified the right in cases involving any action taken by the Parole Board. These conflicts will appear as we proceed with our argument.

The Warrants are Void

Judge Underwood held that the warrants are void. The statute required, that the member of the Board have reliable information. We proved that the member had no information. Judge Underwood found from the evidence that the warrant was issued arbitrarily. The Appeals Court held that the warrant was not important. Judge Waller, in his dissent, has destroyed the comparison made by Judge Sibley to a warrant issued before trial in a criminal case. We quote from Judge Waller, herein p. 158:

> 9. "The fact that a criminal trial may be lawful despite the fact that the defendant was taken on an invalid warrant of arrest, as analogized in the majority

opinion, seems inapt here. The trial in a criminal case is on an indictment or information whereby, if conviction results, the defendant may be deprived of his liberty. It is the indictment or information that informs the defendant of the charges and what he shall be expected to meet. In a revocation of parole it is the warrant of arrest that deprives him of his liberty and that should acquaint him of the thing with which he is charged."

Here we are dealing with the steps required by the statute. We ask less than that said by Judge Waller, to be required. The warrant in form followed the language of the statute. We submit that it could not issue in the absence of information as to violation.

A conflict also exists between Judge Waller and the majority as to whether the old or the new statute applies. We submit that the law as it stood when the warrant issued should govern. Judge Waller said, herein p. 158:

> 8. "The case must be judged by the law as it existed July 1, 1948, or at the time of the issuance of the warrants for the arrest, and not by the New Judicial Code of September 1, 1948."

The position of the Government is not improved by the new law. The new law, paragraph 4205, provides that a warrant may issue for a prisoner *who has violated* his parole. We submit that this increases the requirement. The member who issues the warrant is in the position occupied by a policeman who arrests without a warrant in certain cases. If the policeman be sued for false arrest, he must establish, first that a felony has in fact been committed. As to a parole warrant, it seems that the new statute requires that the member be in possession of belief, based upon reasonable ground, that a violation in fact had occurred.

In the case at bar, the member did not claim that there

had been any violation of parole. He certified, in his warrant, that he had reliable information that there had been a violation. But he merely used a printed form. He testified before a Congressional Committee that he knew of no violation and in fact he knew that there had been none. Petitioners proved, and the trial judge found, that there had been no violation. Judge Waller said, herein p. 157:

> "In my study of this case the following viewpoints have developed.
>
> 1. The Appellees were lawfully paroled.
>
> 2. Between the dates of their parole and their rearrest and reincarceration, they had committed no violation of the conditions of their parole.
>
> 3. That the Parole Board, neither at the time of the issuance of the warrant declaring the parolees to have violated the conditions of the parole and to be fugitives from justice, nor at the time of revocation of parole, had any 'reliable information', or information of any kind, that the parolees had violated the conditions of parole."

The Board claimed the power to revoke because it felt that the continuation of the paroles was not compatible with the welfare of society. The new statute expressly rules out any such right, as it requires that there must be a violation. The Appeals Court holds that no matter how the Board arrived at the decision it was within its rights, and that the courts have no power.

The old and the new are no different, when it comes to consideration of our claim that the Board could not lawfully issue its warrant without any information. Under neither would the Board have power to issue a warrant in such manner as to be deemed arbitrary and capricious. Judge Underwood and Judge Igoe regarded the warrant as void, regardless of any change in the statute.

Although the statute designates the paper as a warrant, in fact it operates as a commitment. In *Columbia System* v. *United States*, 316 U.S. 407, Your Honors held that it makes no difference what label may be put upon the action of an administrative body. The courts should look to the effect.

Bowers v. Dishong

In the case at bar, Judge Sibley said, herein p. 156:

> "In *Bowers* v. *Dishong, Marshall*, 103 F. 2nd 464, this court held that habeas corpus would not lie to test judicially whether parole violation had occurred."

We submit that Judge Sibley failed to perceive the difference between the *Bowers case* and the case at bar.

This case came up for discussion during the argument of Mr. Gottshall and Judge Underwood clearly distinguished it from the case at bar.

We quote from Judge Underwood, herein p. 179:

> "In *Bowers* v. *Dishong*, 5 Cir., 103 F. 2nd. 464, 466, the issue was whether or not the Parole laws applied to prisoners on parole under conditional release. The Court held that they did and that 'The Board of Parole shall have the exclusive authority to issue warrants for the re-taking of any United States prisoner, who has violated his parole.' The validity of the Parole Violator Warrant was not in question.
>
> It will be observed that in none of the cases cited was the validity of the warrant attacked, at least not until after hearing and final revocation of parole, and not attacked, as here, upon the ground that there was no evidence at all to support the warrant."

We also quote from Judge Igoe, in a companion case, herein p. 198:

> "The case of *Bowers* v. *Dishong*, 5 Cir., 103 F. 2d, 464, has been cited as an authority for the proposition

that the statute places no restraint whatsoever upon the power of a parole board member to issue a warrant for the revocation of a parole. In that case, immediately upon his arrest under the parole warrant the prisoner sought and obtained a temporary writ of habeas corpus. After the marshal filed his return showing that he held the prisoner under a parole warrant the District Judge dismissed the writ because the prisoner sought a hearing on whether a violation of the parole had occurred. The court was of the opinion that such a hearing would oust the jurisdiction of the board of parole and that ruling was upheld on appeal. However, in the instant case, the issue is more fundamental. * * *

Therefore, DeLucia is asking the court to inquire into the legality of his detention under a parole warrant which was issued arbitrarily and capriciously and without being based upon information of any kind."

The United States Court of Appeals for the Seventh District, herein p. 167, affirmed this finding and said:

"We cannot reject a finding of the trial court unless it is clearly erroneous. Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A. following section 723c, *Sunal* v. *Large*, 157 F. 2nd, 165; affirmed 332 U.S. 174; *Farrell* v. *Lanagan*, 166 F. 2nd. 845; *Willis* v. *Hunter*, 166 F. 2nd. 721; *United States* v. *Niertheimer*, 166 F. 2nd. 87."

The opinion by Judge Lindley, in the Chicago case, had not been rendered when Judge Sibley announced the opinion in the case at bar.

We know of course that Judge Sibley was not bound to accept the views of trial judges, but such views might have been more helpful concerning the function of a warrant, as intended by Congress and recognized by the courts.

The fact that the Warden abandoned his claim for custody under the warrant makes the question moot as to whether the trial court may intervene by habeas corpus be-

fore completion of Board action, but we submit that a proper understanding of the purpose and function of a warrant remains as an important question for decision. If Congress intends that the Board not proceed until it has information, or until a parolee violates, then the issue of the warrant is a required step in the procedure. Under such an interpretation the warrant is not unimportant if it be claimed, as here, that it was issued arbitrarily.

United States v. Nicholson

Judge Sibley said in the case at bar, herein p. 156:

> "The Fourth Circuit, in the *United States* v. *Nicholson*, 78 F. 2nd. 468; held that the remedy for the Board's failure to give a proper appearance before it, is not habeas corpus but a direct proceeding in mandamus against the Board in the District of Columbia. A similar ruling was made in *United States* v. *Dillard*, 102 F. 2nd. 94."

Reference to the *Nicholson case* will show that the main question concerned good time. Petitioner was in no position to attack the revocation of his parole a year after his hearing. His attack upon the warrant was without any support in the record.

United States v. Dillard

102 F. 2d 94. Judge Underwood gave the Government all it could hope to establish by this case, i.e., a presumption that the warrant was proper. Respondent in the case at bar R. 99 disclaimed any knowledge as to whether the warrant was issued capriciously without information. He relied solely upon this presumption. But the presumption was overcome by the proof. This is a rebuttable presumption

and must give way in the light of the facts proved. Judge Underwood said in his opinion, herein p. 175:

> "(5) However, respondent and the Board have chosen to rely solely on their claim that the Court may not inquire into the matter, but must accept as a conclusive presumption that the warrants were based on reliable information, although the evidence adduced and unrebutted shows that there was no violation and therefore no reliable information upon which to base the warrants."

Nicholson had been discharged below and did not appear in the Circuit Court. It appears that the discharge was based upon an alleged defect in the form of the warrant. Other grounds were given for the discharge, but they were held to be insufficient. The Circuit Court said (p. 95):

> "The only question properly before us is the legal sufficiency of the warrant issued by the member of the Parole Board as authority for the arrest and detention of the prisoner."

The warrant was held to be in proper form. The warrant in the case at bar is in proper form. In the *Nicholson case*, the court was not asked to look behind the warrant. Such a request would have done the prisoner no good because it appears that Nicholson violated his parole by the commission of another crime, for which subsequent crime he had been convicted. The Parole Board member had reliable information upon which to base the warrant, *i.e.*, conviction of another crime. Nicholson did not claim, as we do, that the warrant was arbitrarily issued without evidence. Your Honors will note that the warrant is set out in full in the *Nicholson* case. It states that "satisfactory evidence has been presented" that the prisoner had violated.

The Appeals Court here cites the *Nicholson* case concerning mandamus. The Appeals Court has overlooked

the proposition that mandamus would not lie if the Board has the discretion and power believed by Judge Sibley to exist. Nothing can be gained by further discussion of mandamus. These petitioners had had their so-called hearing.

United States v. Barc

Judge Sibley said, in the case at bar, herein p. 156:

> "The Sixth Circuit, in the *United States* v. *Barc*, 141 F. 2nd. 480; held that a court should not by habeas corpus interrupt the procedure by which the statute prescribes."

Petitioner was convicted of another crime while on parole. He claimed that good time caused his sentence to expire before the violation—a point not here involved. There was no claim that the warrant was not properly issued. We submit that Judge Underwood, Judge Igoe and Judge Lindley, were correct in holding that habeas corpus is proper, when it appears that the warrant has been issued arbitrarily.

Fox v. Sanford

Judge Sibley said, in the case at bar, herein p. 156:

> "Again in *Fox* v. *Sanford*, 123 F. 2nd. 334, we held habeas corpus was not available to test the sufficiency of information of parole violation to justify the Board's warant."

The petition in the *Fox case* presented nothing but a collateral attack upon authorized proceedings of the Board. Fox had been, subsequent to his parole, indicted for another offense to which he pleaded guilty. It will be observed that this case was distinguished from the prob-

lems here presented by Judge Underwood, herein p. 179, from which we quote:

> "In the Fifth Circuit cases, the attacks on the warrant were made after hearing and the revocation of parole. The Court held in *Fox* v. *Sanford*, 5 Cir., 123 F. 2nd 334, 335, that, 'As provided by statute Fox was given a hearing before a member of the Board of Parole, and the reliability or sufficiency of the information upon which the Board acted is not a matter for determination by the courts in a proceeding for habeas corpus.'"

It will be noted that both Judge Underwood and Judge Igoe distinguished properly between any test of the sufficiency of the information and the total absence of information. Judge Sibley failed to perceive the importance of the difference.

Anderson v. Corall

263, U.S. 193. It will be noted that *Anderson* v. *Corall* is cited by Judge Igoe, herein p. 195, in support of the principle that a parole warrant can be issued only in the exercise of discretion based upon information. Judge Sibley cited this case, herein p. 155, in support of the following:

> "That the term may be * * * ameliorated by serving it outside the prison walls on parole is a legislative grace and not a thing of right."

Here again the Appeals Court confused the power to grant or withhold parole with the right to end it. We again quote, from Judge Sibley herein p. 151.

> "As respects parole, the original statutes, as well as the revision now in force bristle with discretion given the Board, and are silent about court interference."

We can not expect to find the power of courts in habeas corpus, spelled out in the parole statutes. Your Honors

must know that that power exists, even where Congress has attempted to take it away, as in Selective Service cases. *Estep* v. *United States,* 327 U.S. 114.

Although Congress expressly provided that the decision of the authorities as to the necessity or desirability of the detention of alien enemies is not reviewable, yet a person detained as such may have his status as an alien enemy determined on habeas corpus. 39 C.J.S., sec. 50, p. 593. It should not be forgotten that:

> "the writ of habeas corpus is the precious safeguard of personal liberty, and there is no higher duty than to maintain it unimpaired." 39 C.J.S. sec. 1, p. 424.

As Your Honors know, the use of the writ of habeas corpus as an incident of the federal judicial power, is implicitly recognized by the United States Constitution. Article I, section 9, clause 2. *McNally* v. *Hill,* 293 U.S. 131.

The parole statutes should receive a reasonable construction, in the light of the fundamental power of the courts to see that due process is afforded a prisoner out on parole.

Judge Sibley seeks to distinguish *Anderson* v. *Corall,* on the ground that since that decision, the warden has been removed from the Parole Board. We quote, herein p. 155:

> "When *Anderson* v. *Corall,* 263 U.S. 193, was decided, the Warden of the penitentiary was always a member of its board of parole, and he was specifically authorized to issue a warrant for a parole violator. He was a proper person to defend an attack on the board by habeas corpus. Under the present law the Warden has no part in parole matters, knows nothing about what the Board does in Washington, and is in no position to explain or defend its proceedings. The use of habeas corpus against the Warden to reach a wrong in the Board's procedure, if there be such, is not to be encouraged."

We submit that the warden is required to defend his position as custodian in answer to a writ of habeas corpus, no matter how he must obtain his knowledge. Judge Sibley might as well have said that the warden is in no position to defend a judgment because he was not a member of the court. *Richardson* v. *Shuttleworth*, 75 F. Supp. 631. The warden is obliged to justify court martial proceedings, although he is not a member of the military tribunal. *Hiatt* v. *Brown*, 175 F. 2nd. 273.

Erroneous View of Majority in Appeals Court

It appears to us that what Judge Sibley has tried to say is,—that without regard to the manner in which petitioners were taken into custody previous to the revocation order, that they should have been returned to the Warden on the mere production of a paper containing a statement that the paroles had been revoked. Since, in any event they were in the custody of the Attorney General, in prison or out, and no hearing was required, the revocation order itself was valid. Judge Sibley seems to think that this is so—regardless of how the Board happened to reach the conclusion that the paroles should be cancelled. There need be no connection between the decision to revoke and the warrant. The warrant is unimportant.

Your Honors will note that Judge Lindley has made an exhaustive study of the cases, and many are cited in his opinion from which we quote, herein p. 169:

> "From the cases cited it seems clear that where it is asserted and the proof shows that the administrative body has failed to comply with the statute and has, therefore, acted without statutory authority, the District Court has jurisdiction of the proceedings. The rule requiring exhaustion of administrative remedies does not apply when the administrative body has exceeded its statutory authority."

After Judge Sibley announced that the statutes bristle with discretion given the Board, it will be observed that Judge Sibley has failed to discriminate between the portion of the statute which gives discretion in the granting of paroles and the procedure required in revocation. Your Honors must know that the silence of the statutes about court interference has no bearing upon the power of the courts. *Eisentrager* v. *Forrestal*, 174 F. 2nd. 961, 965.

A mere statement of the position taken by Judge Sibley should cause its reversal. As is said by Judge Waller, herein p. 159, the Board has surely been placed above the law.

As said by Judge Stephens in *Philadelphia Co.* v. *Securities and Exchange Com'n*, 175 F. 2nd. 808, 817:

> "It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution. The applicability of this clause to the quasi-judicial proceedings of an administrative agency is recognized in *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 170 F. 2nd. 793 * * * ".

After calling attention to the requirements of the statute then under consideration, Judge Stephens said further:

> "We think the requirements of the section as written contemplate a hearing conducted in a manner appropriate for adjudicatory action. But even if the requirements of the Act can be said to be less than clear in this respect, they must be construed as contemplating a hearing so held, for "In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used,

> will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and papably appears." The *Japanese Immigrant Case,* 189 U.S. 101.

It was all right, according to the Appeals Court, for the member of the Parole Board to issue the warrant arbitrarily and without any information, and then for the Board to revoke the parole, without any evidence or information,—without giving the prisoners the hearing required. The short answer to this ruling is that these matters have been before the courts. It has always been held that due process is required.

We again quote from Judge Waller, herein p. 157:

> 4. That the provisions of the statute requiring the Board, after the issuance of a warrant and before revocation of parole, to afford parolees an opportunity to appear before the Board, were intended to require the Board to comply with the Constitutional prohibition against the deprivation of liberty without an opportunity to be heard, and the appearance allowed parolees in this case afforded no such opportunity to be heard as the law and the Constitution contemplate.

Old and New Statute as to Warrant

We quote from the majority opinion of the Appeals Court, herein p. 152:

> "Section 4205 provides: 'A warrant for the retaking of any United States prisoner *who has violated his parole,* may be issued only by the Board of Parole or a member thereof, and within the maximum term or terms for which he was sentenced.'" (Emphasis added.)

That Court has overlooked the significance of the words *"who has violated his parole"*. We proved, and Judge Underwood found, that the Board had no informa-

tion at all, and petitioners had not violated. The prisoners did not come within Section 4205. The Board, or member issuing the warrant, would have to have some information that the prisoner had violated under Section 4205 as well as under the previous statute. The Appeals Court said, herein p. 153, that the trial judge ignored the change in the statute. This is not correct. The old statute and the new statutes are alike in that they both require some information to the effect that a person has become a violator.

As was said by Judge Waller, herein p. 157:

> 6. Neither adverse newspaper criticism of the granting of parole or a demand or request by a sub-committee of the Committee on Expenditures in the Executive Department of Congress can lawfully supplant the requirement of the statute for "reliable information of violation of parole."

The Appeals Court has decided a point contrary to the position taken by the losing party below, R. 150:

> "By Mr. Tysinger: * * * The warrant itself is in the record, and it says 'upon reliable information' and that's what the statute says, except in the new code effective September 1st, 1948, they cut out the 'reliable information' out of that, *but that doesn't affect this warrant*, because they issued it before that. But under the old statute, it says the warrant shall be issued upon 'reliable information.'" (Emphasis added.)

As Judge Waller has observed and as we have said, herein p. 158:

> "The case must be judged by the law as it existed July 1, 1948, or at the time of the issuance of the warrants for the arrest, and not by the New Judicial Code of September 1, 1948."

The old and the new statutes were discussed below in argument. Both were fully considered by the trial court.

The old and new are no different, when it comes to consideration of our claim that the Board could not lawfully issue its warrant without any information. We contend that under neither would the Board have power to issue a warrant in such manner as to be deemed arbitrary and capricious. Judge Underwood properly regarded the old and the new as alike concerning our point, as appears from the following, herein p. 173:

> "The statute, 18 U.S.C.A. 717 (now 4205), applicable in these cases, authorizing revocation of parole, provides that if the Board of Parole, or any member thereof, shall have reliable information that the prisoner has violated his parole, a member of the Board may issue a warrant for the retaking of the prisoner."

Judge Igoe considered the matter under the old statute, and evidently did not believe that Congress had any intention to change the law. We quote, herein p. 188:

> "Section 717, 18 U.S.C.A. authorizes the issuance of a warrant for retaking a prisoner *who has violated the conditions of his parole.* This section reads as follows, 'If the warden of the prison or penitentiary from which said prisoner was paroled, or said Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner,' " (Emphasis added.)

From the opinion rendered by the Court of Appeals in the Seventh Circuit, it appears that that court had before it the opinion rendered by Judge Sibley. Judge Lindley said, herein p. 164:

> "The pertinent statute, Title 18 U.S., Section 717, is:
>
> 'If the warden of the prison or penitentiary from which said prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then

said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner.' "

(Emphasis in Judge Lindley's opinion.)

United States ex rel. Bilkumsky v. Todd

263 U.S. 149, 158. The Appeals Court cited this case to support the finding that "the warrant has become unimportant". We quote from Judge Sibley, herein p. 154:

> "Irregularity in the arrest of an alien does not invalidate deportation proceedings otherwise conformable to law. *United States ex rel. Bilokumsky* v. *Todd*, 263 U.S. 149, 158."

When Your Honors again examine the *Bilokumsky case*, it will be found that, p. 152:

> "It is conceded that, if the fact of alienage was legally established, there was both probable cause for issuing the original warrant of arrest and ample evidence at the hearing to justify a finding that relator was within the United States in violation of law."

This Honorable Court then pointed to proper evidence to establish the fact of alienage. What was said on p. 158, and used by the Appeals Court, was not necessary to the decision, and is not applicable in the case at bar, where the warrant is required by statute, and is jurisdictional.

Permit us to examine the cases cited on p. 158. In *Nishimura Ekiu* v. *United States*, 142 U.S. 651 a person under contract with the Government officials made the arrest, but the proper official ordered that the Japanese woman be not allowed to land. She endeavored to argue that the contractor had no right to stop her in the first place. We hope that Your Honors will agree that these petitioners have rights superior to Japanese immigrants. The following

quotation from *Nishimura Ekiu* v. *United States*, p. 660 should help to distinguish a parole case from an immigration matter:

> "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

Another case cited on p. 158 of the *Bilkumsky case* is *Lasigi* v. *Van De Carr*, 166 U.S. 391. Lasigi was arrested in New York and held by a magistrate for extradition to Massachusetts. He claimed that the Massachusetts courts could not try him because of his consular office. It was held by the District Court that all questions as to the proper tribunal for trial could be heard by the court in the demanding state. It appears that Lasigi lost his consular office during the pendency of the habeas corpus proceedings. This called for application of the rule in *Nishimura Ekiu* v. *United States*. The habeas corpus statute gives the District Court power "to dispose of the party as law and justice require." The *Lasigi case* should also serve to distinguish the *Bilkumsky case* from the case at bar.

Before Your Honors pay much heed to immigration cases may we suggest that Your Honors consult *Gonzales* v. *Williams*, 192 U.S. 1. A woman from Puerto Rica was detained as an alien immigrant. After holding that she did not come within that class of persons this Honorable Court said, p. 15:

> "And in the present case, as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere

question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary."

In the case at bar, after Your Honors ascertain that petitioners were not among those *who had violated parole*, or of whom the Board members had reliable information, Your Honors should hold for naught any mere order of revocation, based upon a void warrant, and made without support.

It is plausible to say that the parole statutes may be so drafted that the granting of parole in the first place and such investigations, hearings, or lack of hearings as may be deemed appropriate in the discretion of the members of the Parole Board is all that is required and that no formal "due process hearing" is required. It is not plausible to say that the procedure outlined by Section 4205 for retaking of a prisoner does not contemplate a hearing which meets the test of due process since the statute expressly says that a warrant for the retaking may be issued for one *"who has violated his parole."* By some method it must be made to appear that he has violated the parole, otherwise the issuance of a warrant would be completely arbitrary and capricious and the Board would be without jurisdiction on an arrest under such a warrant. Under the old statute, in force at the time the warrant was issued, there was required *reliable information*. We again state our contention, *i.e.*, under neither statute can a warrant be issued in the absence of any information concerning a violation.

In view of the fact that the Appeals Court cited an immigration case, we call attention to the following case, cited by Judge Underwood, herein pp 177, 182.

Mahler v. Eby

264 U.S. 32. The immigration authorities used a form of warrant applicable to a different class of aliens than the one before them, p. 44. It was held that the warrant was void. A proper warrant was jurisdictional, so it was held that evidence heard at the hearing could not supply the defect.

As we have said, the Court of Appeals has held that the warrant is of no importance. In order to demonstrate the error involved we refer Your Honors to the general power of a District Court to inquire into the lawfulness of restraint by habeas corpus. We have referred to the statutes, herein, p. 11. Your Honors are familiar with the right of the courts in the matter. In addition to the cases cited by the trial judge, we might refer Your Honors to *Escoe* v. *Zerbst*, 295 U. S. 490, a probation case, cited by Judge Igoe, herein p. 196.

As was said in *Lockerty* v. *Phillips*, 319 U. S. 182, 188:

> "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."

Right to Due Process.

In the District Court of New York there appears to have been a court rule in immigration cases to the effect that the writ of habeas corpus should not be allowed until the end of the deportation proceeding. In *United States ex rel. Loucas* v. *Commissioner*, 49 F.2d 473 it was said that:

> "Possibly the circumstances might in some case be so exceptional as to justify intervention by a writ of habeas corpus at an earlier stage of the proceedings than that Rule XIV indicates. For an instance, see *Whitfield* v. *Hanges*, 222 F. 745, 755."

The old authorities were reviewed by Judge Sanborn in the *Hanges* case. A secret hearing was condemned and

Judge Sanborn answered the argument made on behalf of the government, that the writ of habeas corpus was premature, by pointing out that the detention for further proceeding was illegal. The Court said (756):

> "The deprivation of their liberty was present, instant, and continuing. • • • Refusal to issue the writ and consider their deprivation of liberty would be, in effect, to prolong the period of that deprivation."

The Parole Board must proceed in accordance with the Statute. Otherwise it has no power and no jurisdiction. The paroled prisoner must first be arrested under warrant. *Moore* v. *White*, 23 F. 2d 467. A warrant issued without compliance with the Statute is void. The Statute Sec. 717, Title 18 Criminal Code and Criminal Procedure, requires that the Parole Board member have

> "reliable information that the prisoner has violated his parole"

without such information, such a warrant cannot issue.

If the statement in the warrant, that it was issued upon reliable information, was absent, the warrant would be void on its face. The statement being false, causes the warrant to have no foundation as required by statute. *Moore* v. *White*, 23 F. 2d 467.

In *Clark* v. *Surprenant*, 94 F.2d 969 the court said (974):

> "On the general principles governing the law of habeas corpus, the conclusion is irresistible that this is a proper case for the application of that remedy. We do not see that appellee has another remedy that would be adequate and speedy. In granting the writ, the District Court acted as 'law and justice require.'"

In *Fleming* v. *Tate*, 156 F.2d 848 the District Court granted a writ of habeas corpus because the Parole Board

refused the right of counsel and the privilege of producing witnesses at the hearing. We quote (p. 850):

> "(6) What did Congress have in mind when it said that when so accused the parolee 'shall be given an opportunity to appear before said Board'? It could not have meant merely his physical presence. Such a statutory requirement must have had a purpose. The only conceivable purpose is that the parolee should be enenabled to present whatever he may have to present pertinent to the question raised by his alleged act. Obviously, the Board is to ascertain the facts, and decide what effect should be given them. Its discretion in continuing or revoking parole is uncontrolled, but clearly this statutory provision means that it cannot act in disregard of the facts or refuse to hear argument."

In *Ex parte Urbanowicz*, 24 F.2d 574, the prisoner was first discharged by writ of habeas corpus having been arrested while on parole under a violation warrant. He had been illegally transferred to another prison.

The second arrest, involved in this case, was made without warrant. The Board sent for the prisoner by means of a letter. When he appeared his parole was revoked. We quote (575):

> "It was not there and then charged against petitioner, or even asserted, any of the terms and conditions upon which his parole had been granted him had been violated or broken by petitioner, but, on the contrary, it is conceded no condition expressed in his parole had been violated or broken. What was then claimed, and all that was or is now asserted in this behalf, is that petitioner, while confined in the prison, before his parole was granted, had done certain things which were unknown to the prison officials or the parole board at the time his application for parole was up and granted, and there is no contention now made that petitioner has done any act subsequent to the granting of his parole which would justify the board in forfeiting his parole.

"(1) Coming, now, to the question of the power of the parole board of the Leavenworth prison to revoke the parole of petitioner and reincarcerate him in the prison, as was done in this case, it may be said: The boards of parole of each of the penal institutions of our country are purely creatures of the law, clothed with just such powers, and no more, as the law of their creation confers upon them, and to act in such manner as the law directs, and no other." • • •

The prisoner was discharged. The District Judge said in the *Urbanowicz* case at the outset:

"The matter stands submitted for decision as to the right of the warden, under the peculiar circumstances of this case, to hold petitioner in confinement."

Your Honors will have noticed that Judge Underwood made reference (R. 401 herein p. A-35) to the opinion by Judge Igoe, herein p. 184. Your Honors will find that Judge Igoe has reviewed the authorities in support of our right to habeas corpus. The cases cited in this connection are *Clark* v. *Surprenant*, 94 F.2d 969; *United States* v. *Anderson*, 76 F.2d 375; *Christianson* v. *Zerbst*, 89 F.2d 40; *Anderson* v. *Corall*, 263 U. S. 193; *Escoe* v. *Zerbst*, 295 U. S. 490; *Rogoway* v. *Warden*, 122 F.2d 967; *Bass* v. *Hiatt*, 50 F. Supp. 420; *Whitfield* v. *Hanges*, 222 F. 745; and *Snyder* v. *Buck*, 75 F. Supp. 902.*

We again quote from the opinion by Judge Underwood, R. 395, herein p. 175:

A-18 "However, respondent and the Board have chosen to rely solely on their claim that the Court may not inquire into the matter, but must accept as a conclusive presumption that the warrants were based on reliable information, although the evidence adduced and unrebutted shows that there was no violation and there-

* Upon the general subject of habeas corpus we might add *Price* v. *Johnson*, 334 U.S. 266; *Wade* v. *Mayo*, 334 U.S. 672; *Holiday* v. *Johnston*, 313 U.S. 342; *Bowen* v. *Johnston*, 306 U.S. 19; *Eisentrager* v. *Forrestal*, 174 F.2d 961.

fore no reliable information upon which to base the warrants."

As was said by Judge Waller, herein p. 158:

> 7. That the Parole Board cannot rightfully revoke a parole lawfully granted without cause or grounds for such revocation and the failure of the Board to acquaint either the parolees or the Court below with any grounds for the revocation of the parole should be taken as proof not only that there *were* no such grounds but also should be taken as a deprivation of liberty without due process. (Emphasis in original.)

Mistakes of Majority as to Facts of Case.

We again quote from the majority opinion herein p. 150:

> "Chairman Killinger answers * * * that the Board would be glad to confer with counsel at its office in Washington or consider any pertinent information in behalf of the parolees."
>
> "*At the time of arrest* each prisoner was notified in writing of the charges, three against Compagna and five against Gioe."
>
> "The Chairman by letter offered to let counsel come before the full Board in Washington and present any material or information bearing on the cases."
>
> "The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, *following* the appearance in person of the prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear." (Emphasis added.)

The errors and misapprehensions of the Appeals Court will be perceived when the record is examined. Upon disposing of our petition for rehearing, the Appeals Court admitted, herein p. 160, that it had misapprehended the record, but we submit that that court failed to perceive how far wrong it had gone in its mistakes. Nor did Judge Sibley seem to realize that his mistaken notion of the record formed a basis for his conclusions.

After it is noticed that the letter referred to, R. 350, was written on August 6, 1948, by Dr. Killinger to counsel. The so-called hearing was on September 8, 1948. R. 178. This letter to counsel was in answer to a letter, R. 348, addressed to the Board on July 26, 1948. R. 58. The referral, R. 59, is also dated July 21, 1948. The Appeals Court overlooked the fact that the referrals were concealed from the petitioners until just the day before they filed their petitions for habeas corpus, on September 2, 1948. R. 174, 209.

So, if Your Honors will examine these letters, it will be seen that counsel asked for particulars of the charge on July 27. When Dr. Killinger answered, on August 6, R. 350, there was nothing said in his letter about the nature of the charges. The invitation to appear before the Board in Washington and to submit material, in the absence of any charge, was without any value. The parolees had already been before the Congressional Committee, and had been examined and cross-examined, in considerable detail, concerning their conduct. This testimony had been given in the presence of a member of the Parole Board. The Parole Board had been furnished with a transcript of this testimony. Your Honors will perceive that if counsel had responded to the letter and had traveled to Washington, counsel could have submitted nothing further than that already sworn to by the parolees before the Congressmen. See Board rule 2.16, herein p. 110. To this day the parolees and counsel are in no better position. Unless someone will tell these petitioners why it is thought that these paroles should be revoked, they can not answer any differently than they did to the Congressmen. All we could ever do was to enter general denials, and assert that there had been no violation. If the paroles were revoked because the Board believed that such action was best for the welfare of society, there is nothing that we

could have submitted to the Board that the Board did not already have. In fact, if this turns out to be the ground of revocation, the Board could not very well furnish any specification of charges. There would be none. A hearing would do us no good either, if the Board has the power to act for the welfare of society in the absence of any misbehavior.

We proved that the Board members had stated to Congress under oath that they had no evidence. When we called upon them to tell in a deposition what the warrant was predicated upon, they refused to answer. So Your Honors will perceive that the power of Judge Underwood was not derived alone from the affirmation by the parolees that they were not guilty. The power of the court came from the fact that the warrant was arbitrarily issued without any information. The fact that the parolees were not guilty was only a step in the proof concerning the absence of any foundation for the warrant.

As to any claim that the Board ever gave notice as to the nature of the charges, the trial judge rejected reference to the referrals, as they were not in evidence. There is not the slightest claim by anyone in the record that there is any truth to be found in the referrals. The prisoners not only denied each charge, but we have the testimony of the Board members before Congress that no such violations existed. Judge Waller said, herein p. 158:

> 10. "Neither newspapers, sub-committees, political repercussions, whims, or capriciousness, singly or collectively, without more, justifies the incarceration or reincarceration of an individual longer than it is reasonably necessary to afford him a full and fair hearing on charges adduced against him."

Judge Underwood knew the truth about the referrals and the trial judge knew the real attitude of the Government

attorneys, as shown in the record. The judge correctly found, R. 395, herein p. 174, that there had been a:

A-16 "—failure of respondent to show, or tender proof of, any violation or information relating to parole violation."

The trial court repeatedly expressed the correct view—which has now been incorporated into its findings, R. 393, 394, herein pp. 173, 174:

A-13 "However, if there is some substantial information of a parole violation possessed by the Board member at the time he issues the warrant, a court will not inquire into the reliability of the information, that is properly for the determination of the Board member in the exercise of a fair and real discretion.

A-14 "But the information must be considered reliable by him and must be substantial and relate to parole violation occurring subsequent to the grant of parole, except in special circumstances not present in these cases. Otherwise the issuance of the warrants would be arbitrary or capricious, which the law never permits."

The trial court said further in its opinion, R. 395, herein p. 175:

A-17 "If the fact justified it, statement of the information acted upon would have brought a quick and easy end to the cases."

We submit that the Board members refused to testify for the reason that they had no information. Judge Underwood made a specific finding on this score, R. 396, herein p. 176:

A-21 "On the present record, therefore, the Court accepts as proved that no information of violation of parole was possessed by any Board member, at the time the warrants were issued, creditable affirmative evidence to this effect having been adduced at the trial and not rebutted or denied."

During the trial, there appears the following (R. 293):

> "The Court: I can't conceive why there should be such great secrecy in what the Government claims the violation is.
>
> "Mr. Stewart: Because they have no evidence, and they don't want to admit that. That is the answer.

Judge Underwood made it quite plain, over and over again, that the moment the Government could show that the warrant was based upon information, the case would be at an end. The prisoners would have been remanded and the Board permitted to function. Judge Underwood knew very well that the judicial function is exhausted when there is found to be a rational basis for conclusions approved by an administrative body. *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286. Judge Clark in *Dorsey* v. *Kingsland*, 173 F.2d 405, 408 said that the doctrine of administrative finality might better be known as administrative infallibility.

We refer Your Honors to the Congressional hearings from which we quote:

> "Mr. Rogers (666) * * * Unquestionably I think these men are good parole risks, and they will not violate the law.
>
> "(573) These men have been out for six months, and there has not been a single report of an infraction of a rule of society against them.
>
> "(574) * * * And I personally, on the record as presented to me in these five cases, would say they presented a good parole risk."

Your Honors will perceive that even the hostile Congressmen agreed that these men would not violate parole. The Congressmen said they would not violate because they were too smart. If one obeys the law, his motives for doing so become quite immaterial.

In their anxiety to rely upon a proposition of law the

Government allowed our facts to stand uncontradicted. The desperation of their situation was that they could not meet our facts below.

Where could be found a case to merit habeas corpus if this does not? How often is a prisoner going to be able to show, by virtue of a Congressional investigation, that he has been made a football for ulterior political purposes and that a Board member merely signed a warrant to lock him up,—the Board member knowing at the time that the prisoner had done nothing to forfeit his liberty? How often will be found a case where the Parole Board refuses to tell the charges on the ground that they know the charges to be false? If our remedy be not by habeas corpus, may we ask where is our remedy? What does the power of the courts in habeas corpus include if not such cases as here presented?

We are quite certain that the record demonstrates that Judge Underwood made it clear, during the trial and in his opinion, that he was not concerned with any trial of the question as to whether there had been a violation. The judge found that there had been no violation as a logical step to his ultimate conclusion that Judge Rogers acted without information.

Judge Underwood said in his opinion, R. 395, 396, herein pp. 174, 175:

A-15 "The crucial question here presented is—did Judge Rogers, the member of the Board who issued the warrants on July 21, 1948, have at that time any information of a parole violation?

A-19 "If Judge Rogers possessed reliable information, he might have, in his discretion, either withheld or issued the warrant; but if he had no such information, there was no room for the exercise of discretion and no

authority to issue the warrants. Their issuance would be a nullity and restraint thereunder unlawful."

The petitioners were arrested and put in prison on the parole warrants in July. On the day counsel filed his petition on September 2nd, they learned for the first time of the paper called a referral (R. 26). The trial judge was informed of these referrals by the pleadings and was reminded of them during the trial. Judge Underwood knew how worthless they were. With these papers in mind the judge could still truthfully refer to the "refusal of the Board to even advise petitioners of the charges against them." What the prisoners were seeking was some statement to identify the information upon which Judge Rogers acted, if he had any. The judge repeatedly asked for this information—but received only argument on the law. The claim made by the Government attorneys before Judge Underwood was that the court had no jurisdiction to inquire at all.

The Parole Board Hearing

The Statute, section 719, title 18, is set out herein p. 189 and provides that a prisoner shall be given an opportunity to appear before the Board. These prisoners were returned to the penitentiary in July. Counsel anticipated the sort of hearing contemplated. Before this petition for habeas corpus was filed, counsel wrote the Board (R. 348) requesting that the prisoners be given the benefit of counsel, that they be furnished a specification of the charges and other incidents of a hearing. These rights were refused in a letter to counsel in August (R. 350). The prisoners were called before two members of the Board on September 8, 1948 (R. 189, 209). Here again they demanded the right of counsel, a specification of the charges and other rights of a fair hearing, as outlined in the letter of counsel. This was refused. The so-called hear-

ing took place after the petition for habeas corpus had been granted and before the trial court heard evidence in support of the claim of illegal detention.

The prisoners testified (R. 189, 209) that their hearing consisted of questions put to them by two members of the Parole Board and the record shows the following (R. 201):

> "The Court: The Board had an opportunity to give him a hearing, and if what has been afforded him is not a legal hearing, I think that might be an issue of this proceeding.
>
> "Mr. Tysinger: But that, the board has not taken final action on it.
>
> "The Court: Well, when the board does take final action, apparently it will base its decision on the hearing. I don't think it is a hearing, from the allegations, from the evidence.
>
> "Mr. Tysinger: I just want to call Your Honor, just a minute, to this particular section, 716, Title 18 of the Code. If the prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said board, which was done in this case, of parole, a member thereof, or an examiner designated by the board, the said board may then or at any time within its discretion revoke it or terminate it. (Reads from code section.) That's what I am objecting to.
>
> "The Court: Well, I have a very serious question in my mind as to whether or not just granting a man an appearance before the board, that according to your construction, he might just walk in one door and go out the other, and I don't believe that is the spirit of the Act. I don't know, I want to consider it. But to my mind, allowing a man to appear before the Board means to appear for a fair hearing, to present his side, and as well as to hear the other side."

As will be observed from the opinion rendered by Judge Underwood, it was held that that given these prisoners was not the hearing provided by the statute. The Appeals

Court overruled this finding, herein p. 148, and refused to accept the reasoning to be found in *Fleming* v. *Tate*, 156 F.2nd 848. We submit that the difference between the old and new statute does not warrant an abandonment of *Fleming* v. *Tate*.

Testimony of Parole Board Members Before Congressional Committee

When the paroles were granted Judge Wilson was Chairman of the Board. Judge Rogers was a member. The Republican member was Judge Monkiewicz (667). During the Congressional investigation Judge Wilson took sick. Upon his death, Mr. Lyons was appointed Chairman. Now Mr. Lyons has returned to his office as pardon attorney and Dr. Killinger is Chairman.

Dr. Killinger and Judge Monkiewicz were asked this question, R. 370:

> "32 Is the testimony given by you correctly reported in the printed copy of the volume entitled, 'Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives Eightieth Congress Second Session.'? Would you make the same answers here if the same questions were here put to you?"

Each made the same answer (R. 346, 355).

> "The answer to the first part of the question is 'Yes.'
>
> "I decline to answer the second part of the question since it involves a matter now pending before the Board of Parole."

The volume referred to was certified by the trial judge (R. 421) and filed in the Appeals Court as an exhibit. We expect to move to have this volume certified and forwarded by the Clerk of the Appeals Court to this Honorable Court.

The report of the Congressmen assumes the presence of influence used on behalf of these parolees. This assumption is made without evidence, in face of emphatic denial by the Parole Board members. The Minority Report to Congress finds (p. 23):

> "In summary, the evidence before the committee has failed to produce the slightest indication that the Board of Parole was influenced by any improper motive in granting the paroles under consideration. The Department of Justice and the FBI have worked diligently on the case, and one of the parolees has already been arrested with likelihood that his parole will be revoked."

We merely give this as a preliminary in order to assist in an understanding of the situation here. The question of the legality of the paroles is not in the case at bar, but it must be observed that they were under attack by the Congressmen in order to properly appraise the evidence considered by Judge Underwood.

In its report the Committee calls attention to a refusal on part of the Parole Board to act and asks (p. 17):

> "Can it be that the same influences which caused the paroles to be granted in the first instance are still operating?"

So it appears that the Congressional Committee compelled the Parole Board to either revoke, or be accused of corruption. Petitioners were caught in the middle of a political quarrel, or a contest between powerful forces.

Charges of misconduct were made by some of the Congressmen against the Parole Board, without any basis in the evidence, and in contradiction of the sworn testimony produced before them. The Congressional report states that (p. 15):

"Either because of a lack of inclination or insufficient time, the hearings held by the members of the Parole Board, after application for paroles had been made to it, were neither thorough nor complete, merely perfunctory."

This statement in the Congressional report is opposed to the uncontradicted testimony of the Board members. Many material matters heard and considered by the Board in the matter of granting these paroles and in refusing to revoke them, are omitted from the report made by the Committee. The warrants here in question were the result of the smear campaign and were issued arbitrarily and capriciously, without any justification in law or fact. The warrants were issued merely to satisfy, if possible, the demands of certain Congressmen, made under threat of such action within their power, in the event that the paroles were not terminated. Some of these demands and threats are shown in the record of the Congressional hearings. When Daniel M. Lyons testified that he had reviewed the case and had examined the files carefully and saw no legal basis for revocation, one of the Congressmen expressed his personal view that Mr. Lyons should be impeached (p. 31).

The report states that (p. 31):

"This Committee has the right to believe that, on the basis of evidence adduced by us, the paroles should be revoked and the four men returned to prison."

The transcript demonstrates that the hearings were used by some of the Congressmen to make unfounded accusations and insinuations. Witnesses, including officials, were abused and interrupted. The testimony was twisted and its effect misrepresented. Witnesses were made to appear to say one thing, when in fact another impression was intended. The hearings were *ex parte*. No one but the Congressmen was permitted to question witnesses.

A comparison of the printed Congressional report and the transcript will demonstrate the unfairness of the report in many particulars. Certain information is set out in the report followed by this statement (p. 17):

> "All of this information was either known, or should have been known to the Board before the paroles were granted, had the Board exercised reasonable diligence."

No material fact was developed by the Congressional hearing which was not known and considered by the Parole Board. The explanations given by the members of the Parole Board and further facts necessary to understand the entire picture have been omitted from the report. The transcript shows that each circumstance, deemed to reflect upon the Board, was put to the members of the Board and fully explained by the members. The suspicions of the Congressmen were shown to be unfounded. Facts, recited by the Congressmen, were shown to be not controlling, or were of no consequence in connection with other facts. The Congressmen repeatedly questioned the wisdom of the action of the Parole Board, but it was explained to them that matters of judgment were by law left to the Board. Nothing was shown to bring about any legal method by which that judgment could be overruled or reversed.

As is shown by the transcript of the Congressional hearings the investigation developed no facts upon which a revocation could be predicated.

Some of the Congressmen claimed that in their hearings they had developed a discrepancy between the applications for parole and the facts concerning previous arrests. The Parole Board members explained that the difference, if any, pertained to inconsequential matters. That the number of arrests one way or another was not so important and

that the Parole Board had the benefit of other information, including reports of the Federal Bureau of Investigation.

Members of the Board, including Judge Rogers, testified that no fact had come to their attention after careful study and investigation to cause them to believe that any ground existed to warrant revocation in the matter of securing parole. Judge Rogers stated that he believed that the parolees had a vested interest in their liberty on parole and that unless some subsequent violation took place the paroles could not be legally revoked.

Mr. Daniel Lyons testified (pp. 16, 19) that the parolees were entitled to their liberty as a matter of law.

Judge Rogers was on the stand before the Congressmen as late as June 7, 1948. It appears from his testimony that the Board was in possession of no report, information or complaint to indicate facts upon which a violation could be predicated. It appears that by letter Judge Rogers had promised the Committee action by June 19, 1948. It appears from the transcript that that action had already been agreed upon in the Parole Board at the time Judge Rogers gave his testimony on June 7, 1948. The conclusion must be that the action agreed upon was that these warrants should issue. It is evident, from the transcript, that the unfavorable action was promised and agreed upon, before the Board, or any member, could find any justification for revocation in law or fact. It appears from the transcript that the Parole Board regarded the transcript of the Congressional Committee as a complaint and the recital in the warrant that it has been issued upon reliable information refers to the transcript. In other words, Judge Rogers was forced to regard the Congressional transcript as a complaint, containing information which he has certified as reliable.

We are mindful of the fact that Your Honors will not grant certiorari merely to review evidence and discuss particular facts. *United States* v. *Johnson*, 268 U.S. 220. Nor do we seek to analyze the facts to demonstrate that error has occurred. This would not be permitted. *Mangum Import Co.* v. *Coty*, 262 U.S. 159, 163. We contend that the magnitude of the error does not fully appear upon the face of the opinion rendered by Judge Sibley. We could rest upon the sweeping generalizations to be found in the opinion such as the following, which we quote, herein p. 151:

> "As respects parole, the original statutes, as well as the revision now of force, bristle with discretion given the Board, and are silent about court interference."

But we make a stronger case if we go into considerable detail concerning what Judge Underwood had before him. Judge Sibley had in the record the following evidence of arbitrary action upon the part of the Board members. We demonstrate by the sworn testimony of the Board members that they admitted that they had no evidence upon which to proceed. An affirmance here of the view expressed by Judge Sibley would mean the abolishment of the right of habeas corpus in all parole cases. Standing alone, this contention of ours would appear to be drastic. We beg the indulgence of this Honorable Court, we believe that it is necessary to place the details before Your Honors. We do not seek to have Your Honors analyze the facts for the purpose of showing that the Court of Appeals has mistaken them. Our aim is to show how far wrong the opinion below has proceeded. Judge Waller has said that the majority opinion puts the Board above the law. We seek to demonstrate, not only that Judge Waller is correct, but that the majority had before it, concrete evidence of an

arbitrary and capricious use of power. It is obvious that the majority in the Appeals Court gave no heed to these facts. If Judge Sibley had fully appreciated their significance, he never could have mistaken the record so far as to say as he did in the opinion, herein p. 154, that the members of the Board were out of office. If they were not in office and were not defending themselves before Congress, we could never have proved what we did about their conduct.

To quote from the Congressional hearings transcript (1176):

> "Q. Now after a parole has been granted by the Board, does it, in effect, have the same legal standing as the imposition of a sentence by a judge?
>
> Mr. Rogers: Well, we have a greater control than the judge has of the unserved term, because we can revoke at any time there is a substantial complaint made. * * *
>
> **Q. Do you not think the complaint this Committee has made is a substantial complaint?**
>
> **Mr. Rogers: I most certainly do sir.** * * *
>
> Q. I am not asking what you are going to do. I am asking you when if ever you are going to do that.
>
> Mr. Rogers: I will answer that. The reason no action was taken with reference to that matter is because the Board, exercising its statutory function, has concluded that these cases ought to be considered from all of the complaint angles. **We did not have the record that was before the Committee, which is filed. We need it, we have it, we are studying it, and we are going to do something about it.** (Emphasis added.)
>
> Q. As a matter of fact, Mr. Rogers, is it not also true that these omissions which were left off the applications, * * * were known to the Board at the time the paroles were granted, from your FBI reports that you had before you? * * *
>
> Q. I will ask the Doctor. Is that not true, Doctor, from your examination of the record?

Mr. Killinger: Well, I would like to say that as you know, I came on this Board May 18th. * * * And I am in agreement with you that something should be done about it.

But, my point, along with the Congressman, is that after the men have been released, then you have to be careful, and I am not a lawyer, and I have tried to analyze the situation as much as possible, and the moment that we get all this information together, and I have mine formulated, I am going to make a recommendation definitely."

The information to be found in the Congressional transcript does not comply with the statutory requirement as basis for a warrant. There is not one line of testimony to indicate a violation subsequent to parole. In fact all of the parole authorities who testified indicated that petitioners had kept the conditions of parole and had in every way complied with the law and the rules. The Congressmen stated that petitioners had been careful to abide by the parole agreement. Judge Rogers stated the petitioners were a good parole risk, and indicated in his testimony given on June 7, 1948, that petitioners had proved to be a good risk and petitioners had not violated.

The Board members discussed ways and means to revoke this parole. Judge Rogers testified that they were never confronted with a situation like this before. They agreed that the writ of habeas corpus would be available, and stated that they were anxious to remain, if possible, on legal ground. It is apparent from the transcript that they merely used the warrant as a form, with which they agreed to commence these proceedings. It appears from their testimony that in fact they really had no information upon which to make any charge that there has been a violation.

The following appears in the transcript of the Congressional hearing of March 9, 1945 (p. 713):

Q. On any of these four people in this instant case you have not any record of violation?

Mr. Monkiewicz: No, we have not. We have not, so far, although we have written to Chicago and we have given them instructions to watch these men and give us reports.

Q. Do you have any reports on any of them?

Mr. Monkiewicz: **No.** * * * (Emphasis added.)

Mr. Monkiewicz: There are so many rumors. I believe the probation officer in Chicago would have written us. We have written these people and they are watching these people more than any others.

Q. This is one fact that has been established. * * *

Mr. Monkiewicz: (846) Well, and I will tell you a parolee has a less chance, much less chance of violating the law and not being detected than an ordinary person. Because he is watched and he is under suspicion. He is not pardoned, he is finishing a sentence and up to the very last minute, up to the day before his sentence expires, if he violates the law, they can pick him up and bring him right back to serve the balance of his term.

The transcript of the Congressional hearing shows the following (p. 705):

Q. Don't you think these cases, perhaps, should have been more carefully scrutinized by the Board?

Mr. Monkiewicz: Well, I do not know what other information we could have had at that time.

The Congressional hearings held on March 9, 1948, show the following (p. 708):

Q. Now on the basis of the background of these people and what you have learned since, do you think you have dealt fairly with the community?

Mr. Monkiewicz: Oh, well, when you put it that way—and you say "since"—I would say I would want to think it over and I would think there are great grounds for a review of this whole thing. But I do

not want to give any snap judgment. I am only one member of the Board. I would want to review this whole thing, with all the evidence.

Q. **On the basis of what you know now, do you know of any basis upon which their paroles can be revoked?**

Mr. Monkiewicz: Well, that is a legal question. I think that is something that should be studied. * * *

Q. (710) **Then you are in agreement with Mr. Rogers that these cases should be reviewed again by the Parole Board?**

Mr. Monkiewicz: Oh, I think in the light of everything developed, I think it should be reviewed. (Emphasis added.)

Q. And the Department of Justice provides for the Board legal counsel on matters of this nature, to determine whether the paroles can be legally reviewed?

Mr. Monkiewicz: That is right.

Q. And you would agree with him that there is wisdom in availing yourself of that service?

Mr. Monkiewicz: I do. I would not want you to ask us to make a snap decision right now, decide right now. We would rather review it.

The following appears in the transcript of the testimony of Judge Rogers before the Congressional Committee on March 4, 1948:

Q. (666) Do you not really believe, Mr. Rogers, that in these cases paroles should not have been granted?

Mr. Rogers: In view of the information that I have now, I think that under—well, let we explain it this way: **Unquestionably I think these men are good parole risks, and they will not violate the law.** But, there is another angle to it. There is the public welfare. (Emphasis added.)

I do not think that the publicity that the parole of these men had been given—and I am not criticizing—but I do not think that that has been in the public interests, and I would not, under the—with this information before me—grant the paroles.

Q. I take it, then, that this follows: That the Parole Board erred in not going more deeply into these cases?

Mr. Rogers: Well, I would not—

Q. Well, you have got the benefit of hindsight, which you did not have then. I realize that.

Mr. Rogers: If I had all of these facts before me, I would not have voted.

Q. What was that?

Mr. Rogers: If I would have had all of these facts before me, I certainly would not have voted for parole in this case or any other case similar.

Q. Do you not think, in the light of the information that you have now, that the Parole Board should have gone more thoroughly into these cases?

Mr. Rogers: I do. I think we should have a staff where we could do it.

Q. Then, you will agree that, as you look back on it, at least, the Parole Board committed an error of judgment with respect to these paroles?

Mr. Rogers: Well, at that time I would—

Q. We have already had that. On the basis of the information you had at that time you said that you thought a proper judgment was exercised, but, looking back now—of course, we can see a lot better looking backwards sometimes—but, looking back now, do you not agree with me that the Parole Board committed an error in judgment on these cases?

Mr. Rogers: It is very evident from all of the facts that have been produced here, which I did not have possession of, that it would have been the part of wisdom and best judgment to have ascertained these facts. • • •

Q. (668) **Do you know of any legal basis at present on which the Board can act to revoke them?**

Mr. Rogers: There has been—I would not want to prejudge a thing like that.

Q. I am asking on the basis of present information. I am not asking you to tell me what that is.

Mr. Rogers: I would like to see—now, you see, any

action that the Board would take in the way of revocation would be counteracted very likely with court proceedings, and we would have to be sure we were right. Now, the Board of Parole has—for legal advice—a pretty good legal staff. And as to whether the thing could stick up, I think the Board—that is, I would be in favor of getting an opinion from the legal staff.

And, they have assigned a criminal division of the Department of Justice as the legal adviser to the Board on matters of law, and because they would have to go in to court and represent us.

Q. **Have you taken it up with them to determine whether there is any legal basis for revoking these paroles?**

Mr. Rogers: We have not had anything presented to us on that basis as yet.

Q. Will you do that?

Mr. Rogers: **I want those things—that the Chairman has called to my attention—together with the transcript of the testimony concerning it,** and I assume—I do not know—Mr. Chairman, did the defendants appear before your Committee? * * *

Q. (668) Mr. Lyons was present when they testified. He undoubtedly has a very vivid recollection of what they said.

Q. Well, you will look into the matter to determine what legal avenues are open for revoking these paroles?

Mr. Rogers: I certainly will—very carefully. (Emphasis added.)

Q. And will request assistance of counsel provided by the Department of Justice in that connection. * * *

Mr. Lyons: We have to have the facts first. We cannot ask for a legal opinion until we have the facts. * * *

Q. And that you will undertake to look into the case thoroughly to determine whether there is basis for the revocation of these paroles?

Mr. Rogers: Yes, sir, and if at any time in the investigations of this committee, if anything is turned up to show a clear cut revocation, why, I will be—

Q. Show a what?

Mr. Rogers: A clear cut revocation. I mean, a clear cut violation.

Q. Yes.

Mr. Rogers: I will be only too glad to consider issuing the warrant, and I am sure the other members of the board will be of the same opinion.

The following appears in the testimony of Judge Rogers on March 3, 1948:

Q. (573) And do you not realize that where the Parole Board disregards the previous criminal records and the character of the associates of the applicant for parole, and the Board goes along and grants a parole, that you hold out a temptation to Congress to take that authority away from the Parole Board and so, perhaps, impose upon those who are in prison the injustice of being required to serve the full time?

Mr. Rogers: I would say—I do not think—the Congress, of course, may change the law.

Q. Would not your action in this case induce Congress or be one argument for Congress to change the law and deny to you the power to let out these men, acknowledged to be gangsters?

Mr. Rogers: These men have been out for six months, and there has not been a single report of an infraction of a rule of society against them.

Q. Of course, they are smart. They know that if they violate the terms of the parole that back they go.

Mr. Rogers: We have the FBI that has watched them; we have the Chicago police that have watched them; and not one report has been received by the Board of Parole.

Q. And that, you think, justified turning them loose?

Mr. Rogers: The law fixes the time. * * *

Q. (574) And you still think that the granting of these paroles was correct procedure, do you?

Mr. Rogers: There is nothing irregular about those procedures. * * * And I personally, on the record as

presented to me in these five cases, would say they presented a good parole risk.

Q. And if you had these applications before you now, with the knowledge that you now have, would you still grant the paroles?

• • •

Mr. Rogers: I would not.

Q. Why?

Mr. Rogers: Because I think the injury to the parole system by reason of granting this is more important than the liberation of one or two men from the penitentiary.

Q. What is the injury to the parole system?

Mr. Rogers: What is the injury to the parole system? It is simply this: Every time that I see a case come before me from Chicago, I shudder. • • • Because there is a faction in Chicago that is opposed to parole—state, federal, or anywhere else—and believes that when a man is sent to the penitentiary he ought to go to the last day of his sentence.

When questioned about the transcript of the Congressional hearings Judge Rogers said on June 7, 1948, (1153):

"We have it, (the transcript) and it was brought down in looseleaf form. I turned it over to one of our secretaries, and he cut it down and bound it into five volumes. I looked over portions of the record that I was interested in • • •."

We are definitely going to take action in these cases.

Mr. Rogers: Before a parole can be revoked there must be something presented of a subsequent nature or fraud in the securing of it before we could take action. • • •

There is one thing about this file, this record, that is very significant. It has been one of the most publicized—this Committee's efforts in running down these things—and all of the highspots of this transaction have been brought out

before this Committee. **I know of no witness living that could throw any light on this transaction that this committee hasn't had.** I have carefully gone over your—

Q. • • • And I should think because of the fact of the publicity that has been given this case, it would have moved the Board to do something, at least in eight months' time.

Mr. Rogers: (1164) You have raised a question of Parole there, that I will be glad to answer if you permit me to. You say if this Committee had not raised this publicity. Well, it might have caused a condition to exist that has caused people to walk a pretty straight line, Mr. Congressman, but the parole system for the United States is operated beginning with the locality. The Federal Judges in Chicago have appointed a probation officer who is also parole officer. This parole Officer has control over these men. They are appointed by the Federal Judges. All they do is act as our agent. **I know of no instance in the parole system of the United States where a parole has been revoked that has not come from a complaint originating from the parole officer.** Now, then, may—

Q. (1165) You do not mean to say that the Board would not act if a parole officer out in the district did not make a complaint do you?

Mr. Rogers: Anybody could make the complaint, but I say they go in to the parole officers. We have very fine parole officers, and I believe the parole system in Chicago is good, and they would make the complaint.

Q. Now, in most cases, then, the revocation of a parole results from misconduct after the parole has been granted in a case of that kind, would it not?

Mr. Rogers: That is correct.

Q. But the thing we are talking about here now, is revocation on the basis of paroles having been improperly granted in the first place. Fraud in the inception of the granting of the paroles, which is now a matter of record and common knowledge.

Mr. Rogers: (1166) Well, I think we almost have a meeting of minds in that. Some difference in the procedure is about all.

Q. I would like to pursue this thought just a minute. Now, in the event these paroles were revoked, it is considered likely that court action would be brought by the present parolees to prevent revocation of these paroles?

Mr. Rogers: The writ of habeas corpus is constitutional, and any man who feels he is illegally restrained of his liberty can file a writ of habeas corpus.

Q. That being the case, before paroles could be revoked the Parole Board would want to be pretty sure it had a case it could back up in court and make the revocation stick? Is that right?

Mr. Rogers: It must do that. (Emphasis added.)

The printed volume of Hearings before the Congressional Committee covers only up to March 11, 1948. Highest page number, 826. We had filed the remainder in typewritten form and submitted the excerpts to Judge Underwood in a printed pamphlet marked Traverse. The Government attorneys have a copy of this material, and if there be any question as to the accuracy of our quotations, subsequent to p. 826, we shall move to have this source certified here.

The trial judge took into consideration also the testimony given by the Board members before the Congressional Committee. Judge Underwood said (R. 395, herein p. ...):

A-18 "Petitioners' claim seems to be supported, not only by their testimony, but also by statements made by

> Board members, admitted by them, before a Congressional Committee which was investigating the paroles, and by the refusal of the Board to even advise petitioners of the charges against them. These statements and their refusal to say what charges of parole violation were claimed or what information they had at the time the warrants were issued, appear from the very uninformative answers given to the interrogatories propounded to them by petitioners."

We have quoted from this congressional transcript. Judge Underwood had these excerpts before him at the trial.

Error of Appeals Court as to the Power of the Board

Your Honors will perceive that this entire case boils itself down to that very question of power. If the Board has the power to act for the welfare of society, regardless of any violation, in the matter of revocation, as claimed by Dr. Killinger in his letter, R. 350, and as provided in the Board rules, herein p. 71, there is nothing much for us to litigate. In such event the discretion of the Board would be beyond review by the courts. What is best for society is a matter of opinion. We would have no way of demonstrating that the Board was in error. We submit that the majority opinion of the Appeals Court is to be understood as affirming such power in the Board. The opportunity to show that the revocations are nullities, in the face of such a holding, is of no practical value. If these petitioners are returned, they are worse off than if they had never been granted parole. They lose the good time earned before they came out.

We submit that the Appeals Court is in error in the following, which we repeat from the opinion, herein p. 154,

> "*At the time of arrest* each prisoner was notified in writing of the charges, three against Compagna and five against Gioe." (Emphasis added.)

If we understand the majority opinion, it is not necessary that there be any connection between the warrant and the revocation. The Appeals Court has held that the warrant is unimportant, and merely secures custody,—that the revocation is good, even if it be based upon something beside that upon which the warrant was issued. Of course such a holding is correct if it be true that the Board has a discretion to be exercised to the end that a parole might be revoked if in its opinion the welfare of society is served by such action. If this discretion may be exercised against the continued parole of one who has not violated, there would be no occasion to specify any charge. The warrant in such case would not be based upon any misbehavior and it could only serve to secure custody. In such case, after custody is secured, the warrant would be unimportant. We submit that such construction of the statutes made by the Court of Appeals as to the power of the Board is contrary to the express wording of the statutes, both old and new. The old requires reliable information concerning a violation and the new requires a violation.

Your Honors must agree that the charges upon which the revocation are grounded must come under one of three heads, *i.e.*, (1) those upon which the warrant and referral are based, (2) charges of misbehavior not included in the warrant and referral, or (3) the revocation is grounded on no claim of misbehavior, but is made because the Board reached the decision that such action was best for the welfare of society.

If the revocation is based upon those listed under head (2), the prisoners have had no hearing at all upon them. The record shows all of the matters upon which each prisoner was questioned, R. 167 to 245. No record was preserved about "what they had to say" about charges under (2), because to this day the prisoners have never

heard of them. When we say they have had no hearing as to (2), we mean, not even that which the Appeals Court held to be sufficient in the way of a hearing. Of course there could be no connection between the warrant and charges under (2).

If the revocation be based upon charges under heading (1), there is enough in the record for Your Honors to perceive that the revocation has no legal basis. We request Your Honors to examine the referrals, R. 26, 35, 52, in the light of the statement by Judge Sibley that "each prisoner was notified in writing of the charges." These referrals are fully set out in the record p. .... as follows:

1. Failure to reveal source of monies used in settlement of internal revenue tax, when questioned before a legally constituted body.

This was shown to relate to matters settled before the parole was granted, and properly ruled out of the case. *Ex parte Urbanowicz*, 24 F. 2nd 574.

Tax Matters

There were no tax claims against Gioe arising out of this matter (R. 201). It appears that Compagna filed a truthful report of his income from year to year (R. 219). Some of this income was derived from gambling operations (R. 229). After his conviction and while he was in the penitentiary, the Government served notice that he was charged with the money said to have been extorted from the movie industry in this New York case (R. 230). Compagna denied that he had received any money from this source (R. 216). The judgment entered in the New York criminal case was no adjudication upon the subject. The charge was conspiracy to extort, and the judge instructed the jury in that case that it was not necessary to prove that Compagna had re-

ceived any money. But, while in prison, Compagna was advised that it would help his parole application if he would pay his tax claim (R. 240). So, upon behalf of Compagna, there was paid by his tax attorney, a considerable sum of money to the Revenue Department (R. 226) before he made application for parole. This money was paid with the approval of the United States Tax Court (R. 220).

A compromise having been entered upon, the Government also charged the estate of Frank Nitto, a co-defendant, with tax on this money said to have been received from the movie industry. This effort to collect taxes was resisted. We are informed that the Tax Appeals Court has held that the claim is unfounded.

It was developed by the Congressmen, first, that the Congressmen knew nothing about this tax matter until they stumbled onto it in a fishing expedition. Second, the Congressmen developed the fact that the Parole Board members knew nothing about this tax matter until after the paroles were granted and the Congressmen dug into it (R. 234). Third, there was no question on the form of application for parole which called for tax information (R. 234). Fourth, Mr. Lyons testified (p. 61) that this tax dispute was a civil matter. Mr. Lyons expressed his opinion that if Compagna submitted his contest to the civil courts, and there made settlement, he could not be charged with fraud or deceit. Fifth, each Parole Board member, when questioned by the Congressmen, said he could see no basis for a revocation of parole because of this tax matter.

2. Failure to conduct himself honorably.

About what? How could the Appellate Judges believe for a moment that this constitutes a proper specification, even under an informal practice. Better still would have been the general statement that petitioners had violated parole.

3. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

This took place before the parole became effective. The men were required to report in to the Chicago office. This, and the tax business, came within the same category as the charge against the prisoner who did something wrong before he obtained parole in the *Urbanowicz case.*

Your Honors will perceive that the so-called charges boil down to nothing.

The same oversights apply to the case here against Gioe, but we save the space required for repetition.

In support of the finding made by Judge Underwood that the warrants had no basis, Your Honors will remember that the member who issued the warrants, Judge Rogers, testified before the Congressional Committee that he knew of no violation. It is fair to assume that he knew all about the matters we have been here discussing, *i.e.,* tax matters, airplane rides, et cetera.

In the absence of any statement from the Board members, or the Government attorneys, as to the foundation for the revocation, Your Honors must conclude, as did the trial judge, that it could not have been upon (1).

Judge Underwood said in his opinion, herein p. ....:

> "If the fact justified it, statement of the information acted upon would have brought a quick and easy end to the cases.

Your Honors must conclude as to (2), that there has been no hearing, no invitation to Washington, no notice of the nature of the charges. Further study of the record will leave only (3) as a possible foundation. (3) must have been the basis of the revocation. To make certain that the circumstances in the record which show this to be true, *i.e.*, that (3) was the basis, we continue.

We quote from the letter written by Dr. Killinger, R. 352:

> "It has never been the policy, however, to admit counsel to the deliberations of the Board either at the time it interviews the prisoner in connection with his application for parole or at the time he appears before the Board to make his statement in connection with its revocation or modification. See Rule 4(d), page 3, of our Rules and Regulations promulgated in 1936. Federal Boards of Parole have uniformly assumed, in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board *as to whether the welfare of society* would be promoted by the granting, *revocation* or modification of parole.
>
> Parole is not a legal right vested in a prisoner. It is merely the granting of permission, as an administrative act by an executive agency, to a prisoner to serve a portion of his sentence outside the prison walls. The parolee continues, both actually and legally, to be in custody. He is, however, allowed to remain in the community within limits fixed by the Board but under conditions that permit of *reincarceration* in the event of misbehavior, *or in the event the Board believes continuance of the prisoner on parole is no longer compatible with the welfare of society.*

> To sum up, it is our position that a formal hearing of the kind you seek is not provided for by the statute." (Emphasis added.)

The trial court perceived that the Board ill-advisedly assumed a power believed by Judge Underwood to be beyond that granted by Congress. To point up further the claim made by the Board to this power we direct attention to the following among the rules published in the Code of Federal Regulations in 1938. Title 28, chapter 1, Department of Justice. Similar rules prevail today, but we do not find that the Register has been brought to date.

> "2.32 REVOCATION OF PAROLE. Parole may be *revoked* only by the Board of Parole *when continuation of the parole status outside of the prison is considered to be incompatible with the public welfare.* The most frequent causes for revocation are found in the violation of a general or special condition imposed by the Board on the prisoner at the time of release, or a commission of a new crime. Each case and each charge will be considered on its own merits." (Emphasis added.)

We submit that Your Honors should consider all of these rules in the light of the power of the Board. Not the power thought by its members to be present, but the power given by Congress, as defined by the courts.

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Manhattan Co.* v. *Commissioner,* 297 U.S. 129, 134.

The regulation * * * is invalid because not within the authority conferred by the statute * * *. It is not, in the sense of the statute, a regulation at all, but legislation. * * * The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it. *Miller* v. *United States,* 294 U.S. 435, 439-440.

Not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *Manhattan Co.* v. *Commissioner,* 297 U.S. 129, 134.

The doctrine of the "exhaustion of administrative remedies" does not apply to rules made without authority. *Goldman* v. *American Dealers Service,* 135 F. 2nd 398, 402. *U. S. Alkali Ass'n* v. *United States,* 325 U.S. 196, 210.

Of course if the Board has the power assumed by it, and found to exist by Judge Sibley, these paroles could be revoked without any fault in the parolees, since their release. There need be no information as to violation, as misbehavior would not be necessary. The refusal of the Board to answer interrogatories would be in keeping with such power. It could do no one any good to learn the basis of the revocation if it be a matter of opinion.

The attitude expressed by Judge Sibley, is shown in the following quotation from the majority opinion, herein p. 154:

> "It is very evident that the whole matter of paroles is left to the informed discretion of the Board."
>
> "Parole revocation is informal and discretionary,* * *".

We submit that the Appeals Court made the mistake of regarding the granting of paroles and the revocation in the same manner.

The truth of the matter is that the Board has revoked

these paroles because it believes the continuance of the prisoners on parole is:

"no longer compatible with the welfare of society."

This belief, that it would be more pleasant for everybody if the prisoners were locked up, was engendered by the newspaper pressure and the Congressional hearings. No such power exists in the Board as to revocation. Such a mistake on the part of the Board is one of law, and as such, is subject to review by means of habeas corpus. *United States* v. *Downer*, 135 F. 2nd. 521. *United States* v. *Grieme*, 128 F. 2nd. 811.

It is true, of course, that the Board may exercise its discretion with no interference from the courts, as to the granting of paroles. An examination of the statutes will demonstrate that a person is not entitled to parole unless the Board believes that parole is compatible with the welfare of society. The vesting of such discretion in the Board in the matter of granting paroles gives them an uncontrolled power. The Courts have nothing to do with this business of granting paroles. We submit that Judge Sibley overlooked the distinction between the power given the Board in this matter of giving paroles and in taking them away.

When it comes to revocation, the power of the Board is discretionary, it is true, but Congress has indicated the propriety of certain procedures. *Cf. Escoe* v. *Zerbst*, 295 U.S. 490. A prisoner must be afforded due process. We quote from the dissenting opinion, rendered by Judge Waller, herein p. 157:

> "That one who has rightfully earned and lawfully achieved parole has a status—call it what you will—which he has the right to defend and of which he cannot be deprived except by due process of law, to be afforded either by the Board, or, upon its failure, by the courts."

Your Honors will perceive that Congress has specified a difference between the granting and revocation of parole. We quote from the argument made by the Assistant Attorney General, R. 311,

> "By Mr. Gottshall: Well I still maintain, as I suggested a moment ago, that Congress has prescribed an orderly system for procedure by the Parole Board."

Mr. Gottshall stressed this prescribed orderly system of procedure when he was endeavoring to persuade Judge Underwood that the Judge should wait for final decision by the Board. The Government attorneys have never contended that the courts are without power, by habeas corpus, to inquire into the manner and cause of a revocation.

Depositions of Board Members

In the case at bar when we endeavored to secure the testimony of the members of the Board, or at least that of Judge Rogers, the member who issued the warrants, we were met with objections made by the Government attorneys (R. 159, 166). We were unable to compel the presence of any Board member in court, nor were we ever able to secure their records.

We were unable to secure the deposition of Judge Rogers because of his absence (R. 345). We did secure some answers to written interrogatories, propounded in Washington, from the other two board members (R. 345). Our questions are in the printed transcript (R. 369). We here set out a few questions and answers. Those made by Dr. Killinger (R. 345) and Judge Monkiewicz (R. 355) were alike.

> 30. "Q. Before Judge Rogers signed the warrant for Compagna, DeLucia and Gioe, is it not a fact that they requested an opportunity to be heard and that this privilege was denied (R. 369)?

"A. Prior to issuance of the warrants for Compagna, Gioe and DeLucia, their counsel, Mr. William Scott Stewart, requested opportunity to meet with the Parole Board. That request was not granted because that procedure is not required by statute and is not followed by the Parole Board (R. 346).

32. "Q. Is the testimony given by you correctly reported in the printed copy of the volume entitled, 'Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives Eightieth Congress Second Session.'? Would you make the same answers here if the same questions were here put to you (R. 370)?

"A. The answer to the first part of the question is 'Yes.'

"I decline to answer the second part of the question since it involves a matter now pending before the Board of Parole (R. 346).

33. "Q. In the warrant signed by Judge Rogers, it is recited that reliable information of a violation has been presented. Will you please state what the information was as to each case? When it reached you? Its source, and your reasons for believing it to be reliable (R. 370)?

"A. Answers to the three questions here involved is declined because they relate to a matter now pending before the Board of Parole (R. 346).

47. "Q. Give a summary of the evidence upon which it is claimed that there has been a violation of parole (R. 372)?

"A. I decline to answer because it involves a matter now pending before the Board of Parole (R. 354).

48. "Q. Will you please produce and make a part of this deposition a complete copy of the record of the Parole Board as to matters here involved (R. 372)?

"A. The Board declines to produce the files in these cases upon the ground that they relate to a matter now pending before the board (R. 354)."

Judge Sibley said, herein p. 154:

> "The refusal to answer some interrogatories was due to the belief, we think well grounded, that the court had no part in the Board's deliberations about paroles."

Your Honors will perceive the significance of this holding. Judge Sibley makes no distinction between the granting and revocation of parole. Judge Sibley is of the opinion that habeas corpus is not a proper remedy. Of course habeas corpus would be futile if the Board could rightfully refuse to disclose its proceedings. We submit that Judge Underwood took the correct view. Judge Underwood coupled the refusal on the part of the Board members to answer, with the testimony produced before him, and concluded that the Board had no information of any violation. It followed that the Board was proceeding in an arbitrary manner.

Right to a Hearing.

We believe we might help Your Honors to see the error of the majority opinion filed by the Appeals Court in the case at bar and the correctness of the dissent, if we turn first to the Circuit Court opinion and then to the judgment of this Honorable Court in the *Escoe case*.

In *Escoe* v. *Zerbst, Warden*, 74 F. 2nd, 924, there will be found a number of general statements, including the following, which caused the Circuit Court to miss the real point:

> "It is clear the court had authority on August 5th to revoke the probation order, including the suspension of sentence made by it on October 10, 1932. It had continuing jurisdiction after that date of both the case and of the person of appellant in respect to his probation. * * * Instead of pursuing this course, he has chosen to invoke the higher privilege of habeas

corpus and is now asking this court read into the probation act of Congress (18 U.S.C.A. Sections 724, 727,) a rule of criminal procedure which would make the order of August 5th absolutely void. In this period of enlightened procedural liberalization, it may not be supposed that Congress intended to or that the courts will by construction weigh down and encumber the probation act of Congress with the outworn technicalities of the old criminal procedure."

Now compare the able opinion rendered by Mr. Justice Cardozo in the same case, *Escoe* v. *Zerbst, Warden*, 295 U.S. 490, holding that habeas corpus is a proper remedy to obtain a release of a probationer who has been committed without an opportunity to be heard. The statutes must be complied with. In construing the probation statutes Judge Cardozo said, p. 493:

"The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. *Burns* v. *United States, Supra*, pp. 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."

We trust that Your Honors will keep in mind the difference between the granting of parole and its revocation. The granting of parole partakes of the nature of executive clemency rather than the determination of rights in accordance with judicial process.

We agree that the Board may give or withhold parole in its discretion. The courts have nothing to do with this proposition. But we submit that here is the point that has been overlooked by the majority in the Appeals Court, and noted by Judge Waller in his dissent, when a prisoner

accepts and goes on parole, his status is changed. In order to secure his imprisonment, because of a violation, certain steps are required. In the matter of revocation the courts have power to examine into the matter and determine whether or not there has been substantial compliance with the law and whether or not the board has acted within its power. As was said by Judge Igoe, herein p. ....:

> "Discretion involves the exercise of judgment. The exercise of discretion or judgment depends upon facts."

Quoting from the *Escoe case*, Judge Igoe said further:

> "The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender. cf. *Snyder* v. *Com. of Mass.*, 291 U.S. 97, 116, 54 S. Ct. 330, 78 L. Ed. 674, (683), 90 A.L.R. 575."

In order to bring to the attention of Your Honors some of the limitations placed by the courts on the Board we refer to the case of

Ex Parte Urbanowicz

24 F. 2d. 574. The prisoner was first discharged by writ of habeas corpus having been arrested while on parole under a violation warrant. He had been illegally transferred to another prison. The second arrest, involved in this case, was made without warrant. The Board sent for the prisoner by means of a letter. When the prisoner appeared before the Board, it revoked his parole. The District Judge looked into the matter on habeas corpus and learned that the revocation was made because the prisoner, while confined in the prison before his parole was granted, had done certain things which were unknown to the prison officials, which matters would have caused the Parole Board to refuse his application for parole. The prisoner was dis-

charged on habeas corpus, because the Board had no right to revoke on any such grounds. Your Honors will readily understand that the Parole Board might have refused to parole Urbanowicz if the Board had known of his misconduct, or for no reason. But after the parole had been given to Urbanowicz the Parole Board had to find a violation of the parole. It was necessary that this violation be within the meaning of the statute. The District Judge said, p. 575:

> "The Boards of Parole of each of the penal institutions of our country are purely creatures of the law, clothed with just such powers, and no more, as the law of their creation confers upon them, and to act in such manner as the law directs, and no other."

Another indication that Judge Waller is correct in his statement and that the Board regards itself as above the law is to be found in the Board rule which we quote:

> "2.22 REVOCATION OF PAROLE BECAUSE OF CONCEALED INFORMATION. All grants of parole are predicated on the good faith and frankness of the prisoner. If, after release on parole has been granted, evidence is offered which shows that substantial information, given by the prisoner to the Board either before or after release, was incomplete or wilfully concealed, the Board may revoke the parole granted."

Surely the Board members knew of the *Urbanowicz case* when the opinion was rendered. Yet it has made no change in its rules and continues to warn parolees that any violation of this rule will spell reimprisonment.

No Error in Denial of Motion for New Trial.

Now it seems that, in view of the holding of the majority of the Appeals Court that the warrant has become unimportant, the first opinion and judgment rendered by Judge Underwood has ceased to be of any importance.

First permit us to make a point in passing. We quote from the Appeals Court opinion, herein p. 153:

> "Within the fifteen days, the Board rendered an order revoking the paroles, and certification thereof was made to the Warden. He made a motion to reconsider the judgment and presented this order to the court and asserted that *he now holds custody, not under the warrants of Judge Rogers, but under the order of the Board revoking the parole.*" (Emphasis added.)

If any attention is to be paid here to the paper filed by the Warden at the last moment, we submit that this amounts to an abandonment of the warrant. The Appeals Court found that the Warden asserted that he no longer held custody under the warrants. The Government should not have been permitted to maintain its appeal, concerning the order of the court below with reference to the warrant.

Your Honors will notice from the record, R. 415, that the notice of appeal is double barreled. It stated that the Warden appealed from:

> "the opinion and order sustaining the habeas corpus entered on December 4, 1948, and order overruling the motion for reconsideration of judgment entered December 20, 1948."

In the statement of points relied upon on appeal, R. 417, Your Honors will note that No. 7 states that the trial court:

> "erred in sustaining the writ of habeas corpus and ordering the petitioner discharged from custody."

In a separate paragraph, No. 8, R. 418, it is said that the trial:

> "court erred in denying respondent-appellants motion for reconsideration of the judgment sustaining the writ of habeas corpus."

We submit that the Government should not have been permitted to pursue both appeals. They contradict each other. If the Warden abandoned his claim to hold these men under the warrants, he should not be permitted to appeal the first point. He should not be allowed to prevail on the second point,—for many reasons, overlooked by the Appeals Court.

We again quote from the majority opinion, herein p. . . :

> "The district court here held that the warrant was invalid and that all that followed was void, and did not try at all the Warden's pleading presenting the orders of revocation, but hastily condemned them on the further ground that the hearing was unfair, and released the prisoners from the Warden's custody."

We submit that upon an examination of the records Your Honors will conclude that any reference to the action of the trial court as being hasty is hardly fair to the attitude of patience and extreme care shown by Judge Underwood. The Appeals Court overlooked the fact that at the time of the hearing before Judge Underwood two members of the Parole Board had held their so-called hearing. The matter had been as fully explored.

As to the alleged error on the part of Judge Underwood, in failing to take further action, when the motion to reconsider was presented, permit us to remind Your Honors of a few fundamental principles of law. The general rule, stated in 36 C.J.S. Federal Courts, Section 297, page 400, is as follows:

> "The trial court's exercise of discretion with reference to an application to open, vacate or set aside a judgment will not be disturbed on appeal except for a clear abuse of discretion." * * *.

We refer Your Honors to an opinion by Judge Hutcheson, in *Gas Ridge* v. *Suburban Agricultural Properties,*

150, Fed. 2nd. 363, dissent by Judge Sibley, p. 1020. We quote from Judge Hutcheson, p. 366:

> "As to the action of the court in refusing the motion to reopen the case, this motion was addressed to the sound discretion of the Judge and his action will not be disturbed in the absence of showing that it has worked an injustice in the cause. Nothing of the kind is made to appear."

In *Blytheville Cotton Oil Company* v. *Kurn*, 156 F. 2nd. 467, it was held that the trial judge did not abuse his discretion in denying a motion to reopen case for the taking of additional testimony. The motion was not based on newly discovered evidence, and the evidence could have been readily submitted at the trial. We quote from the opinion by Judge Simons, p. 470:

> "The final claim of error in the failure of the court to reopen a case for the taking of additional testimony must also be rejected. The motion was the equivalent of a motion for a new trial. The granting of such a motion is in the sound discretion of the trial judge and his determination will not be overturned except for its clear abuse."

The motion was not based upon newly discovered evidence. Clearly, Blytheville could readily have submitted the subsequently proffered proofs at the trial.

In *United States* v. *Day*, 20 F. 2nd, 733, writs of habeas corpus were granted to four aliens. Orders were granted in each case sustaining the writ and discharging the relator and the respondent appealed. It was held that in habeas corpus proceeding an order denying reargument is not final and appealable. It appeared that one of the aliens had taken an appeal only from the order denying reargument. His appeal was dismissed, and the orders in the other cases were affirmed.

We quote from *United States* v. *Uhl*, 137, F. 2, 858, 860.

> "The appeal from the second order which denied the relators motion for reargument must be dismissed. Such orders are discretionary and nonappealable. The rule that final orders only are reviewable applies to habeas corpus proceedings. *Collins* v. *Miller*, 252, U.S. 364."

In *DeJordan* v. *Hudspeth*, 137 F. 2, 943, the petitioner failed to appeal from the order denying a petition for habeas corpus within the statutory period, and it was held that an order denying a motion for rehearing is not an appealable order. A number of cases and text books are cited.

In *E. C. Shevlin Co.* v. *United States*, 146, F. 2d, 613, The United States secured the vacation of a judgment previously entered against the Government in condemnation proceedings. From an adverse judgment entered on a new trial after consent judgment had been set aside, the defendant appealed. It was held that the position of the United States as a litigant seeking to establish its statutory rights is exactly the same as that of any other litigant. Judge Denman said, p. 615,

> "Whatever may be the favorite position of the State in German litigation, the United States, before its courts, is no super-personality dominating opposing litigants."

We quote from 36 C.J.S. Section 297, p. 389,

> "The general rule, is that as to matters within the discretion of the trial court, review by the Circuit Court of Appeals is limited to question whether there has been an abuse of discretion, and that unless such abuse clearly appears the Circuit Court of Appeals will not review or disturb the trial court's action or rulings with respect to such matters."
>
> "It has been said that the question of discretion

is the display of sound judgment; that discretion means the equitable decision of what is just and proper under the circumstances, and that abusive discretion in law means that the court's action was in error as a matter of law or was arbitrary and not justifiable in view of the situation of circumstances affecting the exercise of discretion, or was such that no reasonable man would take the view adopted by the trial judge."

The Federal Rules of Civil Procedure do not apply to the trial of a habeas corpus proceeding, for therefore we submit that in spite of the fact that under the new rules formal exceptions to rulings or orders of trial court are unnecessary to save for review alleged errors therein it will be necessary to consult the former practice in order to determine the rules applicable to these proceedings. Such Rule is stated in 36 C.J.S. Section 292, p. 259:

"Formerly exceptions to alleged error were usually necessary in order that such error might be considered on appeal."

Your Honors will notice from the record that the Government attorneys did not take one exception. There is no exception noted to the original judgment, discharging these petitioners, nor was any exception taken when Judge Underwood refused to grant a new trial. So therefore we submit that the Government was not in a position to maintain its appeal.

The general rule is stated in 39 C.J.S. HABEAS CORPUS, Section 107, p. 704, as follows:

"The availability of a rehearing generally in habeas corpus proceedings varies in the several jurisdictions. Even in jurisdictions where a rehearing is permissible, it will be denied where no substantial grounds therefor are shown."

In *Zahn* v. *Hudspeth, Warden,* 102 F. 2nd, 759, it was held in a habeas corpus case that a motion for rehearing is addressed to the sound discretion of the trial court, and its action thereon will not be disturbed on appeal unless there is an abuse of such discretion. It will be noticed that Judge Bratton looked into the showing made by the petitioner upon which he based his petition for rehearing, and found that the same was defective.

We quote from the opinion by Judge Philips, p. 364, in *Western Union Telegraph Co.* v. *Dismang,* 106 F. 2nd, 362:

> "An application to open, vacate or set aside a judgment is within the sound legal discretion of the trial court, and its action will not be disturbed by the appellate court except for a clear abuse of discretion. It is an abuse of discretion, however, to open, or vacate a judgment where the moving party shows no legal ground therfor, or offers no excuse for his own negligence or default. Here, the plaintiff wholly failed to plead or establish any ground for vacating the judgment."

In the *Dismang case,* plaintiff sued for damages as the result of personal injuries sustained when a messenger boy hit her with a bicycle. The court reserved its decision on a motion for a direct verdict, and after the jury brought in a verdict for the plaintiff, the trial judge rendered a written opinion on the motion and held that the plaintiff had failed to establish that the boy was acting within the scope of his employment at the time of the accident, and concluded that the motion for a directed verdict for the defendant should have been sustained. After judgment, the trial court allowed the plaintiff to vacate the judgment on motion, and dismissed the cause without prejudice. This action on the part of the trial court was held to be error by the Circuit Court for the reason that the plaintiff made no showing as to how the plaintiff could possibly overcome the defect in the original action.

We submit that there is a parallel to be found in the case at bar. When the Government attorneys asked Judge Underwood to reconsider the matter and grant them a new trial, it seems as if they should have made a showing as to what they expected the evidence to show on a retrial to support the action of the Board. As far as is shown by this record, the Board may have voted to revoke the parole without any evidence. It may have found its claimed authority to revoke a parole,

> "when it appears that a continuance is not compatible with the public welfare."

Judge Underwood had before him, in the record, enough circumstances to support a finding by him that the last minute revocation was void, having been based upon a mistaken notion of law on the part of the Board, *i.e.*, that it had the power to revoke for the sole reason that the welfare of society required such action. Further, if the Warden had been required to make a proper showing, he might have informed Judge Underwood that the record of the Board discloses that the revocation is based upon the power of the Board to determine that continuance of the parole was not compatible with the public welfare. In such event, there would be no need for any new trial.

Judge Underwood in overruling the motion for new trial said, herein p. 183:

> "If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met with anything but silence similar to that encountered at the hearings already had and nothing would be gained."

We hope Your Honors will perceive that at this point the Government attorneys could no longer remain silent as to the contents of the Board record—that is, if the attorneys expected to secure the exercise of judicial discretion to grant a new trial.

We submit that the Government attorneys are pretty much in the same position as were counsel in *Northwestern Lumber and Shingle Co.* v. *United States*, 170 F. 2nd 692. They should not have been permitted to acquiesce in the trial courts statement and then have the Appeals Court take a different position for them.

Your Honors should be able to ascertain what the revocations were based upon. Judge Underwood said that they were based upon these illegal warrants and the attorney for the Board did not challenge that statement. We submit that if Judge Underwood had reopened the case, all the Warden offered to produce further was a paper he had received by mail. Assuming that this paper had been admitted, we submit that the judgment of discharge would be the only proper judgment. It must not be forgotten that when the Warden received this paper through the mail he was not in the position of a litigant in any other civil case. He was holding these prisoners for the court. He had made a return, as required by law, concerning his right to hold these petitioners. If the paper he received through the mail was to be given any legal effect it would effect a transfer. We quote from 39 C.J.S. sec. 89, pp. 654, 657:

> "Generally a person who has transferred the custody or restraint to another must state in the return, to whom, at what time, and for what cause, and by what authority, such transfer took place." • • •
>
> "The return should be sufficient in its detail of facts to show distinctly that the imprisonment is under the authority or claim or color of authority of the United States, and to exclude the suspicion of imposition or oppression on the part of the detaining authorities. The process or orders under which the prisoner is held should be produced with the return and submitted to inspection."

Citing, under the first paragraph, *In re Knott*, 126 N.W. 1040, 162 Mich. 10, and under the second, *In re Tarble*, 13 Wall. 397.

So, Your Honors will perceive that the respondent was not fully advised concerning his duty to the court. Judge Underwood would have been justified in disregarding the paper entirely.

In *Ferraro* v. *Arthur M. Rosenberg Co.*, 156 F. 2, 212, it was held that when making a motion to open a default and for leave to amend a bill of particulars one must show an adequate basis for the motion. Where the Circuit Court of Appeals could not say that trial judge was clearly wrong in finding that good cause had not been shown, no abuse of discretion on the part of the trial judge was made out.

In *Sheehan* v. *Municipal Light and Power Co.*, 151 F. 2nd, 65, Judge Hand examined into the merits of the moving party when an attack was made upon a judgment.

With the general rules applicable in mind, permit us to ask Your Honors to examine the record. The Warden in his motion to reconsider, R. 404, states that he received the paper through the mail. This paper is set out in the record, R. 406, and purports to have been signed by one Walter K. Ulrich. It is a mere statement that the Board has heard the case in the matter of violation of parole, and has ordered that the parole heretofore granted be revoked,—that this prisoner serve the remainder of his sentence originally imposed as provided by law. Your Honors will notice that no affidavit was submitted to Judge Underwood. The Warden does not claim that he knows anything about the authenticity of this paper except to say that he received it through the mail. Your Honors will notice, R. 99, that, in the response by the Warden, that official disclaimed any personal knowledge of whether the

warrant was issued capriciously and without reliable information. This disclaimer was filed after the writ issued and when the case was reached for trial on October 25, 1948. R. 168. Now here again we have the Warden submitting a paper he received through the mail. He claims nothing more for it. He does not say who Mr. Ulrich might be nor does he venture a guess that the thing might be authentic.

We submit that when Your Honors go through the record and examine the testimony of the petitioners and the depositions given by the members of the Board, and examine the arguments of counsel submitted to Judge Underwood, this Honorable Court will have some idea of the background, and the circumstances confronting Judge Underwood when this so-called paper was presented. We submit that Judge Underwood gave it a great deal more consideration than it deserved. Your Honors will agree that if the Government really wished to appeal to the discretion of Judge Underwood, in order to secure a reopening of the case, the Government should have made some showing as to the nature of the violation, if any, and the evidence upon which it was based. Some showing should be required as to why this so-called revocation was not presented earlier to the court. The Warden does not pretend to know when the paroles were revoked, if at all. The paper does not reveal when the Board acted. These men were arrested in July and filed their petitions before Judge Underwood in September. On October 26th, the hearings and the arguments were concluded and the Judge took the case under advisement. We quote from the Record, R. 293.

> "By the Court: I can't conceive why there should be such great secrecy in what the Government claims the violation is."

Your Honors will note that during the argument made by Mr. Gottshall for the Government, Judge Underwood requested information as to when it could be expected that the Parole Board would act, R. 323. We quote R. 325:

> "By the Court: What I am trying to do, Mr. Gottshall, I am very anxious to find out the attitude of the Board and what the Board itself has done and intends doing, and it seems to me that in all good faith and fairness that there should be no objection on the part of the Board to simply state to the petitioners what grounds they are charged with, what violations they are charged with. As I understand this record, they have not even told the petitioners what they are guilty of. • • • Yes, but the Board has said, 'we won't say anything about it, we won't tell the court. If they have any reason, I don't see any reason why they won't state it.' • • • R. 326. These men testified what happened before the Board, and the Board has not denied it. There is no evidence anything else took place other than what they said. • • • Yes, and it is strengthened by the failure of the Board to contradict or deny it, and it is for the Board to bring in any evidence to show that it is incorrect. That's where I think the difficulty arises. The Board could have made a very simple case out of it."

Again we quote from the Record, R. 328:

> "By the Court: That is what I say. I would like to have pointed out to me, this record, not what was in the mind of somebody else, or in the mind of the Board, but what this record before me shows was the basis of that parole violator warrant, what information. • • • That's what I am calling on you now, to point out what the record shows.
>
> "By Mr. Gottshall: That is the only thing we care to put in the record at this time.
>
> "By the Court: At this time we are closing the record.
>
> "By Mr. Gottshall: All right, we will have to stand on the proposition of law.
>
> "By the Court: All right.

At the conclusion of the argument, the court made the following statement, R. 337:

> "By the Court: Now, as I understand it, the hearing has so developed the case that it comes down, as far as the warrant is concerned, that the only violation that the respondent charges of the parole are those charges set up in the referral. Now, I would like for counsel to go through the record and pick out and furnish to me in their memorandum, their memoranda, any evidence bearing on those particular charges, whether or not there is information that was false or not. I think, for example, if Judge Rogers had information that he considered reliable when he issued the warrant that might support the warrant, even though it proved to be false, but I think in view of the evidence here that would have to be shown by the respondent in this case. I think the petitioner has made out a case of no violation, we will say, and that these other references here that the warrant was issued when they weren't claiming there was any violations, so that seems to me very clearly to put on the respondent, on the Board, if they did have any information or evidence to present it to the Court, and if they didn't present it to the Court, and haven't presented it to the Court, then the Court takes the record before it, and decides on that basis. I repeat, I just can't conceive how a governmental agency will charge a man with something, and then, I mean accuse him of something, and then fail to tell him what he is charged with, especially when the matter is raised as an issue in the courts. I just don't understand it."

We quote from that said by Judge Underwood to the attorneys for the Government at such great length in order to show Your Honors a fact overlooked by the Appeals Court. The Judge said over and over again that we had made out a case sufficient to throw the burden upon the Government,—to show, if it could, a legal basis for continued detention. In the light of an understanding by all concerned as to where the burden of proof rested, Your

Honors, we hope, will give proper weight to the following finding made by Judge Underwood, R. 408:

> "Counsel advised the Court that they did not desire to present further evidence or argument."

Could the Judge have said it any plainer if he had used the following language:

> I have o[illegible] counsel an opportunity to present further evide[illegible]d argument, but all the Government attorneys seek is [illegible]he introduction of a paper purporting to show revocation of these paroles.

So we submit that if Your Honors will examine into the background and estimate the situation the trial judge found himself in, the conduct of the Government attorneys was not such as to appeal to the discretion of the court when they moved for a new trial. Your Honors will note that at first they stood upon a proposition of law. Then when they were asked to bring in whatever they might have and they were told by the judge that the record was being closed. They brought in nothing, except their brief, which reiterated their stand to the effect that it was a proposition of law, *i.e.* the court had no jurisdiction until the Parole Board might act. At no time did the Government attorneys state to the Court when action by the Board might be expected. Nor did they give the court any reasonable explanation as to why there should be such a great delay. The record shows that the Government attorneys allowed the matter to remain under advisement, after the submission of briefs to Judge Underwood in October, until the month of December. After the opinion was rendered the judge of his own motion gave the Government attorneys fifteen days in which to appeal, or to secure a new warrant. The Government attorneys did not ask for further time in which the Board might complete the matter and present the result. The attorneys for the Government took the opinion

of the court,—waited until the fifteen days were up, and then they presented the mere naked motion to reconsider.

No doubt we would have been better fortified here if Judge Underwood had made more complete findings as to his reasons for refusing a new trial. But after Your Honors examine the record and fully appreciate the position occupied by Judge Underwood, when confronted with this motion to reconsider, we hope Your Honors will agree that Judge Underwood could not be expected to anticipate the attitude voiced by Judge Sibley. In this connection we quote from *Albert* v. *Patterson*, 155 Fed. 2nd, 429:

> "Nowhere in Chapter 14 of Title 28 of the United State Code Annotated, is there any provision requiring findings of fact in habeas corpus proceedings. Section 461 of that chapter only requires that upon issuance of the writ 'the court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony in argument and thereupon to dispose of the party as law and justice require.' And, as already appears the federal rules of civil procedure apply to habeas corpus proceedings only on appeal, so that the part of Rule 52A supra requiring a trial court to make findings of fact and conclusions of law is inappiicable. Thus, even if no finding of fact at all had been made by the court below, we could not set its disposition of the case aside unless we could find no reasonable basis therefore anywhere in the record. We find such basis here."

We gather from the majority opinion that the Appeals Court was not satisfied with the reasons given by Judge Underwood for discharging these petitioners. It is a familiar rule announced in a number of cases including that of *Iselin* v. *C. W. Hunter Cole*, 173 F. 2nd 388, that a judgment should not be reversed merely because trial court gave wrong reason for its decision, if there are other grounds to support the judgment. We submit that the Appeals Court overlooked the fact that a judgment of discharge is

the only proper judgment based upon the entire record in this case. In considering the judgment order entered in the case at bar. We refer Your Honors to the rule which we quote from *Gillis* v. *Keystone Mut. Casualty Co.*, 172 F. 2, 826, 830:

> "However, in any event under Rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C.A. no error in any ruling or order or in anything done or omitted by the court is ground for disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice; and the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. This rule is intended for the guidance of the district court, but it should be heeded by the appellate court to make it effective. *University City* v. *Home Fire & Marine Ins. Co.*, 8 Cir., 114 F. 2d 288. In the controversy before us, there was no error prejudicial to the rights of appellants or inconsistent with substantial justice."

Now that we have called the attention of this Honorable Court to the condition of the record, when the Warden at the last moment produced a paper received through the mail, permit us to again quote from the majority opinion, herein p. 156:

> "• • • and did not try at all the Warden's *pleading* presenting the orders of revocation, • • • ". (Emphasis added.)

Your Honors will perceive that the Warden presented no pleading.

In *Tyberg* v. *Warren*, 192 F. 458, in an extradition case, the messenger secured new papers after the court had held the first warrant defective. The Circuit Court discusses the regular course to be pursued, where application is made to vacate a judgment in habeas corpus and to obtain leave to file a supplemental return. Your Honors will

recognize the justice of the rule, when we suggest that in the case at bar, the Government attorneys should have made a showing as to why the former order of Judge Underwood should be vacated. This should have been accompanied with a tender of a supplemental return, with the request for leave to file the same. The showing should have included the record of the Board, or a proper affidavit to show what had caused the entry of any order, when the order was made, and why it was not produced at the hearing. If the Government attorneys had placed the entire record of the Parole Board before the court, Judge Underwood would have been in a position to determine if there was any merit to the last minute maneuver. Cf. *Ex parte Ching Hing*, 224 F. 261, affirmed 234 F. 616.

After Your Honors examine this record, Your Honors will understand why the Board did not take advantage of the original judgment order, in which Judge Underwood gave the Government fifteen days in which to secure a new warrant. Your Honors must realize that if the Board had any evidence of a violation, it would have issued a new warrant. Here is the obvious answer, overlooked by the Appeals Court; the warrants were issued by Judge Rogers, not on information, but because the Board wanted to revoke under its assumed power, relative to the welfare of society. A new warrant on such ground would be no better or no worse than the one issued by Judge Rogers, hence no new warrant.

Your Honors do not suppose, for a moment, that Mr. Gottshall has not inspected the record made by the Parole Board, and is not aware of the ground upon which the warrants issued and the revocations were based. Is it not fair to assume that if Mr. Gottshall found anything in the record to support the action of the Board, it would be forthcoming? Evidence is to be judged in the light of the power

of the party to produce. Mr. Gottshall never claimed, and does not now claim, that the Courts have no jurisdiction to look into such record,—after completion of the administrative hearing.

One more thought on the correctness of the trial court, in refusing to re-open the case, on the showing made. The Government attorneys did not claim the benefit of any presumption of regularity. If the Warden had shown up at the last moment with a certified copy of a judgment of a court, there would have been a presumption in favor of its validity, 39 C.J.S. sec. 100, p. 669. No such presumption attaches to the final orders of an administrative body. Parole Boards included. *Ex parte Bertrand*, 142 P. 2nd. 351, 61 Cal. App. 2nd. 183. There are cases in this Court where it has been said that a presumption of regularity will prevail. But Your Honors had a record showing regular procedure at least arbitrary action was not disclosed.

Parole Board Not a Party.

We again quote from the majority opinion, of the Appeals Court, herein p. 149:

> "The only respondent named is the Warden of the Atlanta Penitentiary, who is not a member of the Board."
>
> "Under the present law the Warden has no part in parole matters, knows nothing about what the Board does in Washington, and is in no position to explain or defend its proceedings. The use of habeas corpus against the Warden to reach a wrong in the Board's procedure, if there be such, is not to be encouraged."

We submit that the Appeals Court overlooked the fundamental traditions arising out of habeas corpus. The custodian is always required to produce the body and show his authority for holding the prisoner.

The Appeals Court overlooked the very definition of

the writ, which is directed to the person detaining another, commanding him to produce the body of the prisoner with the cause of his caption and detention. *Price* v. *Johnston*, 334 U.S. 266. Habeas corpus is a collateral remedy; it is independent of the legal proceeding under which the detention is sought to be justified. *Riddle* v. *Dyche*, 262 U.S. 678.

It has been repeatedly held that the court in habeas corpus may inquire into the cause of a parolee's apprehension and determine whether he had rendered himself subject to liability to serve his unexpired term by reason of his violation of the conditions of his parole. 39 C.J.S., sec. 26, p. 496.

Mr. Gottshall represented the Board members at the taking of the depositions. R. 345. The Board is a subdivision of the Department of Justice. We quote from the record, R. 150:

> "By the Court: Anything else, gentlemen?
>
> "By Mr. Tysinger: No, except in case the writ is issued, the attorneys from the, that represents the United States Board of Parole, chief counsel, Mr. Gottshall, of the Attorney General's office, desires to be present when this writ is issued, and heard. * * *"

Your Honors would have to close your eyes to reality not to know that the warden seeks and follows the directions of the Board. The Board is advised by the Attorney General. The Appeals Court said, as we have pointed out, herein p. 156:

> "The use of habeas corpus against the Warden to reach a wrong in the Board's procedure, if there be such, is not to be encouraged."

We did about everything we could to secure the attendance of a member of the Board. We were defeated on our motion for a subpoena *duces tecum*, because of opposition from the attorneys from the Government. R. 159.

The Board members refused to tell of their proceedings or to produce the records. The Appeals Court said, herein p. 151:

"No effort was made to force further answers."

Please bear in mind that in addition to a reluctance on our part to ask for contempt orders, these men were in the penitentiary. It would not have been wise to delay the hearing before Judge Underwood with collateral proceedings in Washington.

We could not bring our habeas corpus action in Washington, because even if we claimed that the Board had custody, it has been held that the custody must be within the jurisdiction of the court, 39 C.J.S. sec. 54, p. 598. 3 F.R.D. 360; *Goodman* v. *Roberts*, 152 F. 2nd 841; *O'Malley* v. *Hiatt*, 74 F. Supp. 44. The detention exercised by respondent must be actual and not merely formal. *McGowan* v. *Moody*, 28 App. D.C. 148; *Saunders* v. *Bennett*, 148 F. 2nd 19. We did institute direct proceedings in Chicago against the Board but the District Attorney filed a special appearance and defeated us largely on the ground that the Board was not to be found there. *Compagna* v. *United States Board of Parole*, Nos. 9710-11-12 United States Court of Appeals, Seventh District. The Government attorneys claim that the Board can not be reached by means of the Administrative Procedure Act.

Administrative Procedure Act

We again quote from the majority opinion, of the Appeals Court, herein p. 154:

"The requirements as to procedure in the Administrative Procedure Act have no application to the Parole Board. Its procedure is fixed by a later statute, revised title 18, Chapter 311, Parole."

If we are correct, in our understanding of the majority opinion to the effect that the new parole statutes contradict and take the place of the Administrative Procedure Act, or that the new act shows that Congress did not intend parole matters to be under the Procedure Act, we submit that that Court overlooked a stronger argument, *i.e.* Administrative Procedure Act being in effect at the time of the amendment to the Parole statute, Congress had in contemplation the fact that the procedure, insofar as revocation of paroles was concerned, would come under the terms of the Act, especially in view of the fact that *Fleming* v. *Tate*, 156 F. 2nd 848, had been decided. It is a settled rule of statutory construction that when a statute has been construed by the courts and the same is substantially re-enacted, the Legislature adopts such construction, unless the contrary is clearly shown by the language of the Act. It is not necessary that a statute should have been literally re-enacted to authorize the presumption that it was re-enacted in the light of the settled judicial construction that the prior enactment had received. 25 R.C.L. STATUTES, section 297, p. 1075. The new statute was enacted as a part of a general revision. If the construction suggested by the Appeals Court were adopted, the Administrative Procedure Act would become a dead letter as to many other statutes revised in the Judicial Code.

Judge Underwood did not grant relief under the Act, as the Appeals Court observed, herein p. 151:

> "The district judge apparently thought the Administrative Procedure Act, 5 U.S.C.A. Sec. 1001, and following, has no application to the procedures of the Parole Board in granting paroles, revoking, or modifying them, though he did not expressly so rule."

It is not vital to our case that we convince Your Honors that the Administrative Procedure Act applies. The remedy

by habeas corpus is sufficient, without any help from the Act. However, in the interest of accuracy, we believe Your Honors may wish to consider the following, which we quote from the majority opinion of the Appeals Court herein p. 152:

> "Certainly no review of what the Board is doing or has done can be undertaken by habeas corpus where the Board is not a party, and no such directions can be given it as these applications pray for."

If the Administrative Procedure Act applies, it has made express provision for habeas corpus.

> (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any application form of legal action (including actions for declaratory judgments of writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law. • • •

If the revocation is not made reviewable by statute, there is no other adequate remedy in any court and the Administrative Procedure Act provides for judicial review. Your Honors should place this agency action in one of three classes. (1) "Made reviewable by statute," (2) subject to judicial review by habeas corpus because no other adequate remedy in any court exists, or (3) the Board is above the law. We know of no statute under (1). Your Honors can not lawfully agree on (3). 227 U.S. 88, 91; 285 U.S. 22, 56; 319 U.S. 182, 188. We trust that Your Honors will perceive that (2) is the only place for the case at bar.

It is true, of course, as has been said, parole, like probation is a matter of grace. If petitioners were in prison and the Board had refused them parole, the law affords no method by which they could have compelled a decision in their favor. The Board could have refused parole when they became eligible, and the courts would not inquire into the manner in which discretion was exercised. The statute, Title 18, U. S. C. sec. 716 leaves the matter of granting parole to the discretion of the Parole Board. The Board must decide if there is a reasonable probability that the prisoner will live and remain at liberty without violating the laws and the Board must be of the opinion that the release is not incompatible with the welfare of society. *Redman* v. *Duehay*, 246 Fed. 283; *Walton* v. *Hiatt*, 50 Fed. Supp. 690.

But the Board having granted parole, and release having been given upon the conditions stated, the question arises, what are the rights of the parolee? We answer by stating that he has a right to due process. Now the right to due process in this situation is not the same as those rights afforded a person who has not been tried. Many rights have been taken from him by the judgment of conviction.

The rights which have been taken from Compagna and Gioe incident to a criminal trial are no longer involved here. We need not speak of the presumption of innocence, proof beyond a reasonable doubt and right to trial by jury. Such rights are out of the case. They are supposed to have had those rights. But it does not follow that they have had all the rights they are going to get. Now they should have the rights of prisoners on parole. The question now is—what are the rights of one in the position now occupied by Compagna and Gioe? What are the rights of a prisoner on parole?

A man on probation has such rights as may have been

given to him by Congress, *Escoe* v. *Zerbst*, 295 U. S. 490. We make use of the man on probation, for the purpose of illustration, because this Honorable Court has given us a good example. Escoe was on probation. His probation officer reported a violation to the court and the court issued a mandate whereby Escoe was locked up, without any opportunity for a hearing. We assume that Congress could have legislated such a procedure. If Congress had so willed a new commitment might be obtained in the absence of the probationer. But Congress has not seen fit to enact any such scheme. The law is plain that a probationer is entitled to a hearing. No hearing having been granted Escoe, the mandate was void and he was entitled to his discharge by habeas corpus. We quote (492):

> "In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. *Burns* v. *United States*, 287 U. S. 216. But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. *French* v. *Edwards*, 13 Wall. 506, 511. The revocation is invalid unless the command has been obeyed."

After holding that the statute made it mandatory, this Honorable Court said (494):

> "When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to habeas corpus to put an end to the restraint."

So Your Honors will perceive from the *Escoe* case, that although the probation was a matter of grace, the probation could not be taken away, unless the directions given by Congress were followed. The fact that Escoe had violated his probation and that the judge was satisfied from the report of the probation officer that he had so violated did not relieve the court from its duty to afford a hearing. Escoe was not even required to request a hearing.

In probation matters, the direction has been given by Congress to the courts. In parole matters the direction given by Congress, is to the Parole Board authorities. This case will be completely solved when Your Honors determine just what those directions are. We present the case as one of statutory construction. The Constitution would be involved here only if Congress legislated a scheme or plan which took from these prisoners some right guaranteed by that instrument. But as we read the statutes involved, they need nothing but their proper application here. It is a familiar rule that all statutes are to be read in the light of the established due process. Any construction which would cause a statute to conflict with the Constitution should be rejected if possible. *Lockerty* v. *Phillips*, 319 U. S. 182, 188.

The Parole Board in the past has been functioning as if it were a dictatorship with absolute power over the convicts. It is time that all concerned are made to realize that the Parole Board is but another government agency,—as such it must recognize the Constitution, the statutes and the decisions of the courts, as to the requisites of due process.

If the Parole Board had the legal right to operate as it has been functioning, it would mean that it had a power possessed by no other officer, administrative body, or tribunal under our Government. *Int. Com. Comm.* v. *Louis*

& Nash R. R., 227 U.S. 88, 91; *Crowell* v. *Benson*, 285 U.S. 22, 56.*

The trouble with the present attitude of the Parole Board Members is that they seem to believe they make the sentence. The sentence is merely administered by the Board. The parole statutes are a part of every judgment. The statute provides that the parolee, while out of prison, is in legal custody of the warden. But the warden can do nothing about bringing him back, since the statutes were amended to take the warden from the Parole Board. The parolee must be returned to prison, if at all by action of the Parole Board or a member of the Board. This action is founded in the statute. Our question is—what does the statute require of the member of the Parole Board?

Justice Holmes authoritatively stated the principles underlying pardons in *Biddle* v. *Perovich*, 274 U.S. 480, 486:

> "We will not go into history, but we will say a word about principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. See *Ex Parte Grossman*, 267 U.S. 87, 120, 121. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done. So far as a pardon legitimately cuts down a penalty, it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required. * * *"

* In *Stark* v. *Wickard*, 321 U.S. 288, 309 it was held that the silence of Congress as to judicial review, in the absence of an administrative remedy, was not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction.

> "The only question is whether the substituted punishment was authorized by law—here, whether the change is within the scope of the words of the Constitution."

It was said in *Duchay* v. *Thompson*, 223 Fed. 305, 307, that a parole is tantamount to a commutation, for it—

> "substitutes lesser punishment for that imposed by the sentence. It changes one punishment known to the law for another and different punishment, also known to the law. In other words, it substitutes a less grade of punishment for that inflicted by the sentence pronounced upon conviction."

The effect of the parole is that it impresses itself upon the judgment, but enforcement still remains with the court. The sentence remains the judgment of the court, not of the government agency, and is subject to the regulations of law respecting its enforcement. What are the regulations of law? Where are they to be found?

In *Yiakoumis* v. *Hall*, 83 F. Supp. 469 Judge Bryan has discussed the applicability of the Administrative Procedure Act to deportation cases. After holding that the Act does not apply, for reasons not existing here, and calling attention to the apparent conflict in decisions Judge Bryan is of the opinion that the Act should be applied after final action has been taken by the authorities.

The problems confronting Your Honors have been made rather simple by the Administrative Procedure Act, Title 5, Chapter 19, U.S. Code. This Act is the result of more than ten years of intensive study by Congressional and other special Committees. It is important to understand the plan and operation of the statute as a whole. We must read the Administrative Procedure Act into the Parole Board statutes, *Eisler* v. *Clark*, 77 Fed. Supp. 610.

Section 2 (a) of the Act contains a statutory definition of an agency. * There can be no question but what the Parole

* AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United

Board is included. The Parole Board is listed in the Agency Index in the Topical Law Reports published by the Commerce Clearing House, Inc. on the subject of Federal Administrative Procedure.

The final sentence of section 2(a) makes a series of functional exceptions from the entire statute. The execptions are not in point here.*

States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Housing and Rent Act of 1947; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947; and the Veterans' Emergency Housing Act of 1946: (As amended by Acts of August 8, 1946 (P. L. 663) August 10, 1946 (P. L. 719), March 31, 1947 (P. L. 30), and June 30, 1947 (P. L. 129).)

The law does not exempt any agency by name. In preparing the measure, the Senate Judiciary Committee dealt "with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions. Manifestly, it would be folly to assume to distinguish between 'good' agencies and others, and no such distinction is made in the bill. The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill." It does, however, exclude certain types of agency functions or activities in specific cases.

The measure "is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms . . . Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment." House Report.

* Section 2 (a) defines the term "agency" as used in the Act to include each "authority" of the federal government other than legislative, judicial or territorial authorities.

Except as to the requirements relating to public information, the Act specifically exempts—

(1) agencies composed of representatives of the parties to the disputes determined by them—as in the case of the National Railroad Adjustment Board or the Railroad Retirement Board—since the parties themselves are represented in the agencies;

(2) courts martial and military commissions;

(3) military, or naval authority exercised in the field in time of war or in occupied territory.

(4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947; and

(5) functions conferred by the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944.

Agency action is defined in the statute by Section 2 (g).† *Hearst Radio Inc.* v. *Federal Communications Commission*, 167 F.2d 225.

Agency sanction is also defined in the statute, Section 2(f).‡ The issuance and execution of warrant for violation of parole comes under a number of definitions, and the action of the Board member is expressly made reviewable. We now propose to demonstrate the proper application of the Administrative Procedure Act to the case at bar.

Agencies are required to make or publish certain rules designed to inform the public of administrative law and procedure, agencies may provide, by rule, for the exercise of powers by hearing officers, under section 7 (b), under section 8 (a) agencies may, by rule, provide for the making of decisions and for administrative appeals, under section 10 (c) agencies may, by rule, require certain administrative appeals as a prerequisite to judicial review.

As far as we have been able to learn, the Parole Board has made no effort to recognize or comply with the Administrative Procedure Act.

In answer to interrogatories put to Dr. Killinger there appears the following (R. 351, 371):

"Q. 41. Has the Parole Board made any effort to

† AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

‡ SANCTION AND RELIEF.—"License" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

comply with sec. 1006, Chapter 5, United States Code as to Hearings?

"A. I have been advised that Section 1002, Title 5, United States Code, which is part of what is commonly referred to as the 'Administrative Procedure Act', is inapplicable to the U. S. Board of Parole.

"Q. 42. Is it not true that a so-called hearing as to the cases of Compagna and Gioe was held in the Penitentiary at Atlanta by two members of the Parole Board, George Killinger and B. J. Monkiewicz, in which hearing the parolees were denied the right of counsel, and the usual requirements as to due process, and that no effort was made to comply with the Administrative Procedure Act?

"A. Compagna and Gioe were given an opportunity to appear before Board members Killinger and Monkiewicz at Atlanta Penitentiary on September 8, 1948. At such appearance both Compagna and Gioe read to the Board members a copy of the letter written by Mr. Stewart to the Board of Parole on July 26, 1948, copy of which is made part of my reply to question No. 40. Gioe read the said letter at the start of his appearance and thereafter answered all questions without objection. Compagna answered all questions without objection and at the conclusion of his appearance read the said letter of July 26, 1948. Section 719, Title 18, United States Code, now Section 4207, same Title, which is the authority under which the Board acts in such matters, contains no provision for representation by counsel. I am unable to state therefore that these paroles were denied the usual requirements as to due process. As stated in the answer to question No. 35, the Administrative Procedure Act is believed inapplicable to the Board of Parole.

"Q. 43. Is it not true that the Parole Board has refused although requested, to postpone the effective date of the action taken in committing these parolees as required by sec. 1006 (d), Title 5, United States Code?

"A. The Board of Parole has given no consideration to Section 1006 (d), Title 5, United States Code, a portion of the Administrative Procedure Act, because that Act is believed to be inapplicable to the Board of Parole."

In *Lang Transp. Corporation* v. *United States*, 75 Fed. Supp. 915, 924 it was said:

> "This court is likewise in agreement with the cases cited by the plaintiffs to the effect that a 'full and fair' hearing before the Commission is a fundamental requirement of the Interstate Commerce Commission Act; and, where a hearing is denied by the Commission, or where the hearing granted is inadequate or manifestly unfair, the Commission's order is void." (Citing cases and Administrative Procedure Act of 1946, 5 U. S. C. A. 1009 (e).)

It will be seen that the Administrative Procedure Act required Judge Rogers to grant Compagna and Gioe certain rights before Judge Rogers undertook to issue the warrant. We include in our discussion of the Administrative Procedure Act some of the requirements to be met by the Parole Board before the parole can be legally revoked.

Section 3 (a) requires publication, in the Federal Register, of statements of the general course and method by which its functions are operated. No person shall be required to resort to procedure not so published. The Parole Board and its members have been operating as if no one had a right to question the action of a member who signs a warrant. No rules have been adopted and no procedure has been established. The member has been acting as if he were in possession of absolute power. This section 3(b) provides that every agency shall make available to public inspection all final orders. Persons directly concerned are given access to official records by section 3(c). Access should be made by published rules. Exceptions exist to these provisions of the statute, but do not seem to be applicable here.

We have been unable to find anything published by the Board in the Federal Register. The Parole Board published

some rules in the Code of Federal Regulations in 1938, Title 28, Chapter 1, Department of Justice.*

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*Title 28, Judicial Administration

CHAPTER 1—*Department of Justice.*

The Code of Federal Regulations of the United States in Force June 1, 1938.

2.13 HEARINGS AT INSTITUTIONS. In order to provide prompt hearing of all applicants and the disposition of all current matters with respect to violators, individual members of the Board visit each Federal institution regularly, hold hearings, assemble the facts and prepare recommendations on cases in keeping with the established polices of the Board. These recommendations are then submitted to the Board for final action which is taken in Washington.

2.14 PROCEDURE. Such hearings are restricted. Prisoners must appear in person and may not be presented by counsel or by any other person. No interviews will be granted to a prisoner unless his application is regularly docketed for hearing. These meetings are closed to the public. The records are thereof confidential records and are not open to the prisoner or any other person, but the Board reserves the right to make public the name of any or all persons favoring parole if the application is granted.

2.15 SAME: RESULTS. At these hearings at the institutions, the prisoner meets with the Board member or members and his statements and answer to questions are considered in the light of the entire record in terms of the policies of the Board. The member hearing the case makes his recommendations and the dockets are then submitted to the members in Washington, together with the record, and after consideration the actions recommended are confirmed, modified or changed.

2.16 ADDITIONAL INFORMATION. The Board welcomes information of a material character which may be of assistance in arriving at a just determination. All material of this character should be submitted in writing. However, attorneys, or others, who wish to present oral or written briefs or letters of any nature pertinent to the case may do so by appointment at the Board's headquarters in Washington. It will be necessary for any person before appearing to disclose his interest in the case. No oral arguments will be allowed until the prisoner has been heard at the institution and where an oral presentation has been permitted, no subsequent interview will be allowed except by special order of the Board.

2.18 REVIEW OF A CASE. After a case has been acted upon by the Board, and a definite determination had thereon, the Board will not again review the case except after material information, not previously considered, is presented to the Board.

2.21 The Board may reconsider any case on its own motion, it may advance, postpone, or deny a parole which has been granted; and it may add to or modify the conditions of parole at any time.

2.22 REVOCATION OF PAROLE BECAUSE OF CONCEALED INFORMATION. All grants of parole are predicated on the good faith and frankness of the prisoner. If, after release on parole has been granted, evidence is offered which shows that substantial information, given by the prisoner to the Board either before or after release, was incomplete or wilfully concealed, the Board may revoke the parole granted.

2.32 REVOCATION OF PAROLE. Parole may be revoked only by the Board of Parole when continuation of the parole status outside of the prison is considered to be incompatible with the public welfare. The most frequent causes for revocation are found in the violation of a general or special condition imposed by the Board on the prisoner at the time of release, or

We are in receipt from George C. Killinger, Member of the Parole Board, on August 9, 1948, in response to our request, a pamphlet dated 1936 entitled Rules and Regulations of United States Board of Parole, Department of Justice.* No reference was made by Dr. Killinger to the rules published in 1938. Neither set of rules was drawn with any thought that a parolee should have any rights, except those arbitrarily granted by the Parole Board. Neither set of rules recognizes the requirements of due process. These rules were adopted, of course, before Congress passed the Administrative Procedure Act. It will be noticed that these old rules of the Parole Board fail to distinguish

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a commission of a new crime. Each case and each charge will be considered on its own merits.

2.35 REFERRALS. On receipt of information of what appears to be a violation of parole or conditional release, a referral is prepared with accompanying evidence and presented to the Board or any member thereof.

2.36 ISSUANCE OF WARRANT. In the event that the Board or any member thereof finds cause, a warrant is issued.

*"8 GENERAL POLICY FOLLOWED IN GRANTING PAROLE AND IN REVOKING PAROLE:

"Parole is a privilege and is not a right. It cannot be earned in the same sense that 'good time' can be earned.

"Parole is granted, when, in the judgment of the Board of Parole a prisoner is competent and anxious to readjust himself socially and when the factors which will affect him and his family at his release guarantee adequate public security. These factors vary in every case. The Board evaluates the factors involved in each case and acts as its judgment indicates to grant or to deny release on parole. The Board welcomes information of a material character which may be of assistance in arriving at a just determination. All matters pertaining to any application or applicant should be submitted in writing and filed with, or mailed to the United States Board of Parole, Washington, D. C.

"The Board of Parole reserves the right to make public the names of any or all persons favoring parole if the application is granted.

"When any court of competent jurisdiction finds the parolee guilty of a violation of law while on parole, parole will be revoked by the Board.

"If a parolee violates any of the conditions imposed on the parolee by the Board, a warrant will be issued and the parolee returned to the institution.

"All grants of parole are predicated on the good faith and frankness of the prisoner. If, after release has been granted, evidence is offered which show that substantial information, given by the prisoner to the Board of Parole either before or after release, was incomplete or was wilfully concealed, the Board may act to revoke the parole granted.

"When a violator is taken into custody exclusively under a warrant issued by the Board of Parole, his sentence shall begin to run from the date he is taken into custody on that warrant, and the period of his absence from the institution will not count toward service of his original sentence.—U. S. Code 723c."

—between the position of a convict in the matter of his application for parole, from the position of a parolee. These old rules provide that the hearings with respect to violators are restricted. Prisoners may not be represented by counsel. These meetings are closed to the public. The records are thereof confidential and are not open to the prisoner or any other person. It is evident that these rule makers did not contemplate a court review, even at the completion of the revocation, when they provided that the records were not open to the prisoner or anyone?*

The members of the Parole Board must surely be familiar with the decision in *Fleming* v. *Tate*, 156 F. 2d 848, holding that a parolee has the privilege of counsel and the right to produce witnesses. Yet we find no change in the rules of the Board since that decision. We find the Chairman of the Board expressly prohibiting those rights in the matter of these parolees. How are we to understand the action of the Board in this regard? Does it put itself above and beyond the power of the courts? Does it intend to give the right of counsel, and other incidents of due process, only in such individual cases as may be brought to court? Administrative practice is of no avail to overcome a statute so plain in its command as to leave nothing for construction. *U. S.* v. *Youngstown Sheet and Tube Co.*, 171 F. 2nd 103.

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*"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 134.

"The regulation * * * is invalid because not within the authority conferred by the statute * * * It is not, in the sense of the statute, a regulation at all, but legislation. * * * The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller* v. *United States*, 294 U.S. 435, 439-440.

"Not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable." *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 134.

The doctrine of the "exhaustion of administrative remedies" does not apply to rules made without authority. *Goldman* v. *American Dealers Service*, 135 F. 2nd 398, 402. *U. S. Alkali Assn.* v. *United States*, 325 U.S. 196, 210.

Section 5 provides for statutory hearing procedures. Section 9 (a) provides that no sanction shall be imposed except as authorized by law. When the Administrative Procedure Act is considered, as a whole, it will be seen that if Judge Rogers and the Board has proceeded properly we would find the following:

1. The Board would have adopted, and published in the Federal Register, rules of procedure concerning the manner in which the Board or a member might exercise the statutory power given to issue a warrant. This procedure would require notice, a specification of charges, and the right to a hearing, including representation by counsel, and other safeguards against arbitrary action, enumerated in the Administrative Act.
2. The Board would have adopted, and published, a rule whereby the parolee might remain on parole, or give bail, until the matter was heard, in a proper case.
3. Further; Rules as to the making of a record for court review might also have been adopted.

The reviewable issue or the "scope of review", often stated in general terms, partakes of the constitutional limitations upon judicial power, and may or may not be modified by the terms of legislation. The several categories of issues of law on judicial review are questions of constitutional power or right; the fairness, adequacy, or lawfulness of administrative procedure; the judicial interpretation of statutes and agency jurisdiction, sometimes the aid of the administrative construction or the legislative history or interpretation; the sufficiency of required findings and conclusions, apart from the evidence, to support the order made or action taken; and the sufficiency of the evidence to support the findings and conclusions made or action taken either upon judicial trial of the facts *de novo* or upon the administrative record. We have copied our summary from

the treatise to be found in Topical Law Reports by the Commerce Clearing House, Inc. A study of Section 10 should be made in considering our right to a review.*

Section 10(b) provides that, unless lacking or inadequate so that resort must be had to general actions, the form of proceeding for judicial review "shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute." This provision ties in with section 10(a) and section 10(c). The reference to "any court specified by statute" is apparently meant to include both matters of venue and the type of court to which a party may resort—that is, the action might be authorized to be brought in the circuit or district in which the person aggrieved resides, and it might be filed in the United States Court of Appeals for that circuit rather than the United States District Court of that district.*

*(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments of writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

*"The first sentence of this subsection is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special forms of judicial review are lacking or insufficient." *Senate Committee Report*, 1945, p. 26.

"The declaratory judgment procedure * * * may be operative before statutory forms of review are available; and in a proper case it may

Your Honors will note that Section 10(b) provides for

be utilized to determine the validity or application of agency action." *Senate Committee Report*, 1945, p. 26.

"The first sentence of this section is an express statutory recognition and adoption of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special statutory forms of judicial review are either lacking or insufficient." *House Committee Report*, 1946, p. 42.

"The expression 'special statutory review' means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by statute as the appropriate mode of review." *Senate Committee Report*, 1945, pp. 26-27.

"The expression 'special statutory review' means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by other statutes as the appropriate mode of review in given cases." *House Committee Report*, 1946, p. 42.

"Mr. Walter: * * * Under this bill the technical form of proceeding for judicial review, is first, any special proceeding which Congress has provided or, in the absence or inadequacy thereof, any relevant form of action such as those for declaratory judgments or injunctions in any court of competent jurisdiction." *Congressional Record*, May 24, 1946, p. 5759.

"Mr. Austin: Is it not true, that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review? Mr. McCarran: That is correct. Mr. Austin: And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned? Mr. McCarran: That is true; the Senator is entirely correct in his statement." *Congressional Record*, March 12, 1946, p. 2195.

"Mr. Austin: In the event that there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto, and so forth? Mr. McCarran: My answer is in the affirmative. That is true. Mr. Austin: And does he contemplate that even where there is no statutory authority for certiorari, a party might bring certiorari against one of these agencies? Mr. McCarran: Unless the basic statute prohibits it." *Congressional Record*, March 12, 1946, pp. 2200-2201.

"Mr. Bennet of New York: * * * It does not specifically provide where an appeal should be taken for which reason I assume the appeal would have to be taken to the District Court of the United States. I am not an expert on these matters, but I think ordinarily bills of this nature have provided for appeals to the circuit court of appeals. If I am correct about that, that means it is going to be quite a long drawn out process of appeal in some of these cases * * * Mr. Walter: The only instance where an appeal can be taken to the circuit court of appeals in the first instance is where there is a special statute providing that method of appeal. In all other instances the appeal must be direct to the United States district court. Mr. Bennet of New York: That is what I said in substance in my statement. But statutes have been passed which permitted appeals directly to the circuit court of appeals in order to save time. There are any number of administrative agencies covered by this bill and anybody who believes himself injuriously affected by an order can appeal as I understand it to the district court. If he is not satisfied with the decision of the district court he can go on to the States Supreme Court if they will grant him a writ of certiorari." *Congressional Record*, May 24, 1946, p. 5766.

habeas corpus. The issuance of the warrant, in the case at bar, constitutes a final agency action. There is no other adequate remedy in any court. The statute under which the warrant was issued is silent as to court review. The agency has provided for no review. So the Administrative Act gives Compagna and Gioe the right to review by habeas corpus.

Section 10(c) provides that, "except as otherwise expressly required by statute, agency action otherwise final shall be final for the purpose of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."*

The Agency action we endeavored to require the lower court to review is designated by the name WARRANT in the statute. The Constitution, Amendment IV, provides that no warrant shall issue but on probable cause, sup-

*"The last clause, permitting agencies to require by rule that an appeal be taken to superior agency authority before judicial review may be sought, is designed to implement the provisions of section 8(a). Pursuant to that subsection an agency may permit an examiner to make the initial decision in a case, which becomes the agency's decision in the absence of an appeal to or review by the agency. If there is such review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter. For that reason this subsection permits an agency also to require by rule that, if any party is not satisfied with the initial decision of a subordinate hearing officer, the party must first appeal to the agency (the decision meanwhile being inoperative) before resorting to the courts. In no case may appeal to 'superior agency authority' be required by rule unless the administrative decision meanwhile is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency actior and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action had become, and while it remains, effective." *Senate Committee Report*, 1945, p. 27.

"The last sentence makes it clear that the doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applicable only (1) where expressly required by statute (as, for example, is provided in 49 U.S.C. 17 (9), or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review." *Interpretation of Attorney General, Senate Committee Report*, 1945, p. 44.

ported by oath etc., the Federal Rules of Criminal Procedure, Rule 4, make provision for a warrant. We do not claim any rights under the Constitution, the statutes or the rules relative to regular warrants, because we know we are not attacking a warrant, as there defined. By the same token we should not be confronted with defenses the Government might have to our attack if we were seeking a review of a real warrant. This is not a warrant under scrutiny, although Title 18, Section 723c U. S. C. provides for the issuance of a WARRANT. If it is not a warrant, what shall we call it? If we called it a COMMITMENT ORDER we would more nearly approach a description of its function. In *Columbia System* v. *United States*, 316 U.S. 407, 416 it was held that it makes no difference what label an Administrative body puts upon its action. The courts look to see what is the effect of the action.

Suppose that Compagna and Gioe had been unable to secure this writ of habeas corpus? Where would they be now? As Your Honors must know from the statute, they would now be in the penitentiary with a convict's number and subject to the rules of the prison, undergoing confinement. The warden would hold them by virtue of this warrant, yet they would have none of the rights of a person taken under a regular warrant. So the effect of the action of Judge Rogers, the Member of the Parole Board, in signing this WARRANT would be a COMMITMENT. As such, it is a final order and reviewable under the Administrative Procedure Act. See Rule 8 of the Parole Board in footnote above, which provides, pursuant to statute, that "his sentence shall begin to run from the date he is taken into custody on that warrant." Under Section 10(e) the trial court has been given the right to interpret the statute under which this warrant was issued, to determine the real meaning of the warrant and to set it aside.*

* "It will * * * be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection,

Section 10 (e) provides that "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." Unlike other terms defined in Section 2, the terms "agency proceeding" and "agency action" are inventions for the purpose of the statute.*

The warrant in the case at bar was issued without an administrative hearing (and not required to be issued after such hearing) and we submit that the warrant is invalid. So therefore we may show the facts upon which we predicate our claim of invalidity. Congress has not provided that the agency shall give us a hearing, or a review, so therefore the record must be made in court.†

Section 6 (b) provides that no process shall be issued or enforced for any purpose except as authorized by law.‡

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and to determine the meaning of the words and phrases used." *Senate Committee Report*, 1945, p. 31.

"Courts are required to determine the application or threatened application or questions respecting the validity or terms of any agency action notwithstanding the form of the proceeding or whether brought by private parties for review or by public officers or others for enforcement." *House Committee Report*, 1946, p. 44.

* "The term 'agency action' brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements of reasons or basis for the action or inaction. House Committee Report, 1946, P. 21."

†"Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid for some relevant reason of law, he may show the facts upon which he predicates such invalidity. In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court." *House Committee Report*, 1946, pp. 45-46.

"Mr. Walter: * * * Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined *de novo* by the reviewing court." *Congressional Record*, May 24, 1926, p. 5760.

‡"Mr. Walter: * * * The second subsection of section 6 limits any form of investigative process to authority conferred upon an agency by law. This limitation will require any agency to justify its process in case of a contest thereof by demonstrating that upon the law and the facts it is acting within its proper sphere of operations. Congressional Record, May 24, 1946, p. 5757."

Section 7 (c) provides that the proponent of a rule or order shall have the burden of proof. Section 7 (c) provides that "No sanction shall be imposed or rule or order be issued except * * * as supported by * * * reliable, probative, and substantial evidence."*

Section 10 (d) provides for Intermediate Judicial Relief.†

* "The standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in non-administrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings. Senate Committee Report, 1945, p. 22."

"Mr. Walter: * * * The same provision contains two other limitations—first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—see *Edison Co.* v. *Labor Board* (305 U. S. 197, 230). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it. Congressional Record, May 24, 1946, p. 5758."

†SECTION 10 (d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"This section permits either agencies or courts, if the proper showing be made, to maintain the status quo." *Senate Committee Report*, 1945, p. 27.

"This section permits either agencies or courts, if the proper showing be made, to maintain, the status quo." *House Committee Report*, 1946, p. 43.

"Mr. Walter: * * * Of importance in the field of judicial review is the authority of courts to grant temporary relief pending final decision of the merits of a judicial review action. Accordingly section 10 (d) provides that any agency may itself postpone the effective date of its action pending judicial review or, upon conditions and as may be necessary to prevent irreparable injury, reviewing courts may postpone the effective date of contested action or preserve the status quo pending conclusion of judicial-review proceedings. Congressional Record, May 24, 1946, p. 5759."

"The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, statutes authorizing agency action are to be construed to extend rights pending judicial review and the

exclusiveness of the administrative remedy is diminished so far as this action operates." *House Committee Report*, 1946, p. 43.

"Mr. Walter: The section is a definite statutory statement and extension of rights pending judicial review. It thus, so far as necessary, amends statutes conferring exclusive authority upon administrative agencies to take or withhold action. Its operation will involve no radical departures from what had generally been regarded as an essential and inherent right of the courts; but, however that may be, this provision confers full authority to courts to protect the review process and purpose otherwise expressed in section 10." *Congressional Record*, May 24, 1946, pp. 5759-5760.

* Section 10 (e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

"Without observance of procedure required by law, means not only the procedures required by this bill but any other procedures the law may require." *Senate Committee Report*, 1945, p. 28.

" 'Without observance of procedure required by law' means not only the procedures required and procedural rights conferred by this bill but any other procedures or procedural rights the law may require." *House Committee Report*, 1946, p. 44.

"Mr. Springer: * * * 'Without observance of procedure required by law.' That is potent and powerful reason. Decisions thus can be set aside where there is no observance of the legal procedure on the part of the hearing administrator or agent. When that authority has been taken into his hands and he has failed to observe the legal requirements and procedures, then such a decision, predicated upon that theory, can be set aside." *Congressional Record*, May 24, 1946, p. 5762.

" 'Substantial evidence' means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications, or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party." *House Committee Report*, 1946, p. 45.

Before his elevation to the District Court, Judge Holtzoff served as an Assistant to the Attorney General and served on various committees having to do with the drafting of rules, including the committees appointed by the Supreme Court. In *Snyder* v. *Buck*, 75 Fed. Supp. 902 Judge Holtzoff has explained the meaning of the Administrative Procedure Act, particularly as to the right of judicial review. The right of a Navy widow to compensation was involved. We quote, p. 907:

> "In this connection, it is desirable to consider subsection (b) of Section 10, which provides that the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments of writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. In other words, if there is provided an adequate specified statutory review proceeding in respect to the specified agency action, this form of proceeding should be pursued. In the absence or inadequacy of any such proceeding, recourse may be had to any applicable form of legal action. By the word 'applicable' is meant 'appropriate or suitable.' Consequently, the aggrieved party may invoke any suitable or appropriate form of proceeding or remedy.
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> "Thus the Standard Dictionary defines the word 'applicable' as follows: 'Applicable, capable of being applied: suitable or fit for application; relevant, fitting.' Webster's Dictionary contains the following definition: 'Capable of being applied; fit; suitable, pertinent.' Black's Law Dictionary, 3d Ed., p. 125, defines the term as follows: 'Applicable, fit, suitable, pertinent, or appropriate.' The word 'applicable', therefore, is not a term of limitation but of description.
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> "The reports of the Committees on the Judiciary of the Senate and House of Representatives, concerning this legislation clearly indicate that the foregoing conclusions are in accord with the legislative intent." • • •

"A review may, for example, be had by an action for a declaratory judgment, by an action for a restraining or mandatory injunction, by a petition for a writ of habeas corpus, or some other fitting remedy. This result necessarily subjects to judicial review a large group of administrative actions which previously could not have been re-examined or set aside by the courts. This category includes numerous determinations of private rights, in respect to which a writ of mandamus did not lie, because they involved functions that were not purely ministerial, but required a decision on questions of law or questions of fact by the administrative agency."

Judge Holtzof in *United States* v. *Watkins*, 73 Fed. Supp. 216, a deportation case, pointed out (219) that the Administrative Procedure Act does not modify the existing forms of proceedings to review, but that a different question is presented in dealing with the scope of review as distinguished from the nature of the remedy. See also *Zander* v. *Clark*, 80 F. Supp. 453; *Valenti* v. *Clark*, 83 F. Supp. 167; *Wong Yang Sung* v. *Clark*, 80 F. Supp. 235. Judge Goodrich, in *United States* v. *Carusi*, 166 F.2d 457 recognized that the Administrative Procedure Act gives a method of review not enjoyed before. In *U. S. ex rel Cammarata* v. *Miller, et al.*, 79 F. Supp. 643 it was held in a deportation case that it was the intention of the legislature to permit the filing a petition or bill of review in any district in which habeas corpus proceedings might be properly brought. See *Wong*, 82 F. Supp. 60; *U. S.* v. *Johnson*, 82 F. Supp. 36; *Fisher* v. *Haeberle*, 80 F. Supp. 652; *Scholnick* v. *Clark*, 81 F. Supp. 298; *Azzollini* v. *Watkins*, 172 F. 2d 897, holding that the Act does not apply to deportation proceedings. *Yanish* v. *Wixon*, 81 F. Supp. 499; *Chow Kan* v. *Clark*, 83 F. Supp. 969; *U. S. ex rel. Johnson* v. *Watkins*, 170 F. 2nd 1009; *U. S. ex rel. Knauff* v. *Watkins*, 173 F. 2nd 599.

The House Judiciary Committee Report explanation of changes in Senate Bill (p. 55) shows that the House added

the words *an abuse of discretion* to Section 10 (e) (B) (1).* It appears from *Wettre* v. *Hague*, 74 Fed. Supp. 396 that even in proceedings under the Veterans' Preference Act,

* "The change is designed to make it clear that S. 7 preserves judicial review of abuses of discretion."

"It will • • • be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. Senate Committee Report, 1945, p. 31."

"Nevertheless, in the nature of things, for most practical purposes it is to the agencies that the Congress and the people must look for fair administration of the laws and compliance with this bill. Judicial review is of utmost importance, but it can be operative in relatively few cases because of the cost and general hazards of litigation. It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted. Yet, in the vast majority of cases the agency concerned usually speaks the first and last word. For that reason the agencies must make the first, primary, and most far-reaching effort to comply with the terms and the spirit of this bill. Senate Committee Report, 1945, p. 31."

"Mr. Walter: • • • The final subsection of section 10 states the extent or degree of review which courts are required to afford under this bill. Congressional Record, May 24, 1946, p. 5760."

"This declares the existing law concerning the scope of judicial review." Interpretation of Attorney General, Senate Committee Report, 1945, p. 44."

"Mr. Springer: • • • The second provision to which I now refer, provides 'and hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' To my mind, that is a most potent statement and is a fair and equitable provision of the bill. • • • Mr. Scrivner: Does the gentleman feel that that would correct the evils that might exist where a regulation was contrary to the intent, spirit, or purpose of the act? Mr. Springer: I think, unquestionably, it would. The gentleman is precisely correct. That is the purpose and that is the intention of that provision which has been written into this bill. In those cases where these decisions are found to be arbitrary, where the decision is found to be capricious or an abuse of discretion or otherwise not in accordance with the law, the decision can be set aside. That is certainly fair, that is certainly equitable, and that is certainly based upon a sound philosophy. Congressional Record, May 24, 1946, p. 5762."

"'Accordance with law' requires, among other things, a judicial determination of the authority or propriety of interpretative rules and statements of policy. House Committee Report, 1946, p. 44."

Mr. Springer: • • • The next provision under the scope of review to which I desire to call the attention of the Members is that any decision can be set aside which is contrary to constitutional right, power, privilege, or immunity. There is no one in the world who could object to a provision of that kind because that is based upon the sound philosophy of the law. Congressional Record, May 24, 1946, p. 5762."

"Mr. Springer: • • • The following provision in the scope of review that I desire to call to the attention of the Members is that in cases 'where the decision is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,' such decision can be set aside. In other words, where the person who has been tried has had taken away from him the legal rights to which he is entitled; or the limitation to which he is entitled under the provisions of the law have been reduced, then that character of decision under the scope provided in this bill can be set aside. Congressional Record, May 24, 1946, p. 5762."

"'Without observance of procedure required by law' means not only the

which are not reviewable until completed before the agency, the court considered whether or not there should be a stay order pending administrative proceedings under the Administrative Procedure Act.

Section 5 (a) provides for notice, etc.* Your Honor will notice particularly that in fixing the place for hearings, due regard shall be had for the convenience and necessity of the parties. A secret hearing in a penitentiary, hundreds of miles from home, could not satisfy this provision.

Section 6 (a) provides for the right of counsel.† Your Honors will compare the rights secured by Section 6 (a)

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procedures required by this bill but any other procedures the law may require. Senate Committee Report, 1945, p. 28."

" 'Without observance of procedure required by law' means not only the procedures required and procedural rights conferred by this bill but any other procedures or procedural rights the law may require. House Committee Report, 1946, p. 44."

"Mr. Springer: • • • 'Without observance of procedure required by law.' That is a potent and powerful reason. Decisions thus can be set aside where there is not observance of the legal procedure on the part of the hearing administrator or agent. When that authority has been taken into his hands and he has failed to observe the legal requirements and procedures, then such a decision predicated upon that theory, can be set aside. Congressional Record, May 24, 1946, p. 5762."

*(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

†(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. • • •

"Mr. Walter: • • • Section 6 (a) deals with the right of parties to have the advice or representation of counsel or, to the extent that agencies lawfully permit it, representation by non-lawyers. The representation of counsel contemplated by the bill means full representation as the term is understood in the courts of law. Counsel may thus receive notices, decisions, and awards. Agencies are not authorized in any manner to ignore or bypass legal representatives that parties have selected for themselves pursuant to this section. Congressional Record, May 24, 1946, p. 5757."

with the present rules of the Parole Board whereby the right of counsel is expressly denied.*

Will Your Honors compare the requirements of due process and the Administrative Procedure Act with the rules of the Parole Board? The rules of the Board (2.15 *ante*) provide that the member hearing the case makes his recommendations and the dockets are then submitted to the members in Washington, together with the record, and after consideration, the actions recommended are confirmed modified or changed. Remember, that these are secret records. The finding of the first hearing officer need not be announced and there is no rule or standard by which the Board is required to act contrary to the hearing officer. Please compare with the requirements of the Administrative Procedure Act.

When counsel for the inspector in *Whitfield* v. *Hanges*, 222 Fed. 745, 755 contended that the action of the court in habeas corpus was premature because the final order of deportation the Circuit Court said (p. 755):

> "The deprivation of their liberty was present, instant and continuing."

After holding that the proceeding had been unfair up to the point of detention, the court noticed that further proceedings along the same line might render petitioners remediless.

In draft board cases the problem as to when the courts should step in was made a little more difficult than our case, because Congress had legislated that no court review should be available. The Supreme Court said that the constitution required that judicial review be available to test the validity of the board's classification. The Supreme

*Dr. Killinger wrote on August 9, 1948 in reply to our request for the right to appear as counsel that such right would be denied. The right to a hearing and representation by counsel before the issuance of the warrant was expressly refused by Judge Rogers (Traverse, p. 29).

Court held in *Falbo v. United States*, that Congress was not required to provide for such a review prior to final acceptance of the registrant for service. But this case was overruled in *Estep* v. *United States*, 327 U. S. 114, where Mr. Justice Black said (p. 125) that the Act does not require courts to march up hill when it is apparent from the beginning that they will have to march down again.*

The Government Attorneys would have a parolee submit to an illegal commitment, to be transported a thousand miles from home, there to face a star chamber session, as a convict in prison, without benefit of counsel or witnesses or any other semblance of the requirements of a fair hearing. For what purpose? In order that the illegal procedure of the Parole Board might be followed out to completion. As said by Mr. Justice Murphy; "No more drastic condition precedent to judicial review has ever been framed."

The *Estep* case was decided without benefit of the Administrative Procedure Act. Due process requirements are the same, with or without the Administrative Procedure Act. The Administrative Procedure Act makes the requirements of due process easier to understand. The Act spells out the requirements.

See *United States ex rel. Loucas* v. *Commissioner*, 49 F2 473 and *Whitfield* v. *Hanges*, 222 F. 745, 755.

It is important that Your Honors receive a clear pictur of the law and the procedure in immigration cases in orde to fully understand the meaning of *United States ex re*

* In *Ludecke* v. *Watkins*, 335 U.S. 160 it was held that the Alien Enem Act precluded judicial review. Three Justices dissented and Mr. Justi Douglas said, (187) "The notion that the discretion of any officer government can override due process is foreign to our system." (18 "Those findings and conclusions and the procedure by which they we reached must conform with the requirements of due process. And habe corpus is the time-honored procedure to put them to the test."

Trinler v. *Carusi*, 166 F.2d 457, wherein Judge Goodrich applied the Administrative Procedure Act to the problems there involved. Appellant, Trinler, was an alien resident made the subject of a deportation order. This order was issued on the ground that he had failed to maintain his treaty merchant status. Claiming that the Administrative Procedure Act gave him a right to judicial review of this order, he filed in the District Court a paper labeled "Petition for Review," *before he was taken into custody.* The trial court dismissed and this appeal followed.

> "Our conclusion is that the case does not fall within the exception. Therefore the judicial review provisions found in Section 10 of the Act are applicable. We are impressed by the fact that in spite of the basic statute's wording habeas corpus proceedings have always been available. Since they have been available the situation cannot be one where judicial review in the past has been precluded. In this we are supported, we think, by discussion found in the legislative history of the Act. In that discussion it was pointed out that statutes which preclude judicial review are unusual. Congressman Walter pointed out to the House of Representatives that this clause was simply put in to provide for the unusual situation where judicial review of administrative action was actually precluded."

In order that Your Honors may fully appreciate the increase given by the Administrative Procedure Act to the right of review Your Honors might examine the case of *Ex parte Lee Fong Fook*, 74 Fed. Supp. 68, 71, decided before the Administrative Act, from which we quote:

> "These contentions, however, are premature, inasmuch, as the administrative proceedings have not yet been completed. The writ will not generally lie as to errors or irregularities in administrative proceedings themselves until petitioner has fully pursued the administrative remedies provided by law. *United States* v. *Sing Tuck*, 194 U.S. 161, 24 S. Ct. 621, 48 L. Ed. 917;

United States ex rel. Loucas v. *Com'r of Immigration*, *D. C.*, 49 F. 2d 473."

Now if Your Honors will look at *Clark* v. *Surprenant*, 94 F.2d 969 again, it will be seen that a parolee has been given the right of judicial review, by habeas corpus, before the enactment of the Administrative Procedure Act. So it must follow that Compagna and Gioe now have the right to judicial review under Section 10.

An example of an agency action not subject to review is to be found in proceedings under the Railway Labor Act, *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F.2d 529. Here the Supreme Court had decided that certifications of bargaining representatives are not subject to judicial review in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297.

We direct the attention of Your Honors to other provisions of the Administrative Procedure Act under which Compagna and Gioe are entitled to judicial review. Judge Goodrich granted Trinler the right to a review under Section 10 (a). Under Section 10 (e) the court is required to determine the meaning of the agency action here. We say it was a commitment. Under Section 10 (e) (B) a court is required to hold unlawful and set aside agency action found to be

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations;

(4) without observance of procedure required by law;

(6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

It should not require further detail in our argument to demonstrate that the agency action against Compagna and Gioe is reviewable under all of the above provisions.

(1) The action of the agency in issuing the warrant has been found by Judge Underwood to be arbitrary.

(2) The constitutional right to due process has been violated by the issuance of the warrant.

(3) The statute permits the agency to issue a warrant only on reliable information. Without such information, the agency has exceeded its statutory jurisdiction and authority. If the new law be held to be applicable, the warrant should issue only where there has been a violation.

(4) The agency has not observed the procedure required by law, including the procedure required by the Administrative Procedure Act.

(6) The facts are subject to trial *de novo* for the reason that no provision is made by the agency for the preservation of a record.

We also again call the attention of Your Honors to the provision of Section 9 (a).

(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

We submit that the warrant in the case at bar comes within the statutory definition of a sanction, Section 2 (f). The warrant is an agency requirement affecting the liberty of a person and also it imposes a penalty, the issuance of the warrant was the taking of compulsory or restrictive action. The issuance and execution of the warrant comes clearly within the statutory definition of agency action Section 2 (g).

We also call attention to Section 6 (b).

(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law.

The *Senate Committee Report*, 1945, p. 44 shows the *Interpretation of Attorney General* as to the scope of review provided by the Administrative Procedure Act as follows:

> "This declares existing law concerning the scope of judicial review."

Motion to Dismiss

We filed in the United States Court of Appeals, printed motions to dismiss, supported by an affidavit. Our contention is that these cases have become moot. A printed memorandum in opposition was filed by the Government attorneys. We find no mention of this motion or any disposition in the opinion of the Appeals Court. We respectfully request that Your Honors give this matter attention. Particularly in the light of the finding made by the Appeals Court, that the Warden ceased to hold these petitioners under the warrants of Judge Rogers.

Your Honors will notice from the affidavit filed in support of the motion to dismiss herein that petitioners were returned to Atlanta Penitentiary as parole violators. That during the time that they were lodged in the penitentiary under the warrant they were regarded and treated as convicts in the service of their original sentences. After they were discharged by Judge Underwood they returned to their respective homes in the Chicago district, and reported themselves to the local parole authorities. They

were informed that no reports were to be required. Subsequently, the Parole Board reconsidered the matter and ordered that these petitioners resume the status of parolees. After the order of the Parole Board, petitioners complied by submitting the required reports. Such reports have been approved and accepted. Appellees have complied with the rules and regulations and have accepted the status so imposed upon them since their discharge by Judge Underwood. Therefore, it is alleged that there has been a change of custody since this appeal was perfected. Appellees are no longer in the custody of appellant. No real controversy exists between the parties and this case has become moot.

Your Honors should keep in mind that the statute gives the Board power to not only revoke parole but to modify or restore it. If a revocation took place before December 14, 1948, R. 406, does not the requirement of parole reports in April 1949 mean that the previous action of the Board had been reversed?

We quote from the memorandum in opposition filed by the Government attorneys, p. 2.

> "It should be apparent therefore that appellants' custody of appellees had completely ceased before either the appeal could be effected or the appellees submit parole reports, and appellees status has in no wise changed."

We dispute the allegation that the status has not changed. Your Honors must know from the record that the status of each one of these prisoners has been changed a number of times since the original conviction.

During service of their sentence, before parole, these men were first in the custody of the then Warden at Atlanta. Then they were transferred and paroled from the custody of the Warden at Leavenworth. The warrants,

held to be void by Judge Underwood, and of no importance by the Appeals Court, designated Atlanta and gave custody to Mr. Hiatt. After Mr. Hiatt produced the prisoners in response to the writ, they were held by virtue of the writ of habeas corpus. *Principle* v. *Ault*, 62 F. Supp. 279.

When they went out on bail, they were answerable to their bondsmen. When the Board revoked the paroles it had the power to designate any penitentiary. If it has elected to choose Mr. Hiatt as custodian, the record fails to show this fact. No service was made on the petitioners concerning the order of revocation. Is it not reasonable to infer that the revocation order has been abandoned?

We quote from the Parole Board rules:

> "The Board may consider any case of its own motion, it may add to or modify the conditions of parole at any time."

It is our contention that the Parole Board, by its conduct, has abandoned the warrant issued by Judge Rogers. The Parole Board having resumed custody in the case at bar, the warden has no further interest or power in the matter. Therefore, the Government appeal should have been dismissed by the United States Court of Appeals.

In *Factor* v. *Fox*, 175 F. 2d 626, Your Honors will note that the authorities have recently been reviewed by Judge Simons.

The warrant, while in existence, gave to these petitioners the status of a fugitive from justice. After petitioners were released by Judge Underwood, and the appeal was perfected, Judge Underwood had no more jurisdiction over them. The Parole Board then kept petitioners in some other status for some months, or until the Board wrote the letter of April 4, 1949, which letter is set out in our

motion to dismiss, p. 4. The fact that the Board had the power to determine from time to time just where petitioners stood is a part of our argument. The status of petitioners can not be determined upon any one factor. The entire situation must be appraised. There are times in the life of a convict, when he is neither on parole, nor doing time on his sentence. *Washington* v. *Clemmer*, 169 F. 2d 300; *United States* v. *Farrell*, 87 F. 2d 957; *Zerbst* v. *Kidwell*, 304 U. S. 359. The Parole Board has the power to interrupt a parole status. This right has been exercised for the purpose of compelling a convict to complete a new sentence. As soon as we bring to mind that the Parole Board had the power to change the status of petitioners, then the next step will be to determine just what the Parole Board has done here.

We quote from the letter of April 4, 1949:

> "I am in receipt of a letter from Mr. George G. Killinger, Chairman, U.S. Board of Parole, advising that after considering the matter for some time with reference to your parole status since your release, the board has come to the conclusion that you are regarded as in the parole status and that monthly reports be required."

This could have been more plain, if the Board had said in so many more words, that it had abandoned the warrant, and had abandoned the order of revocation, but we contend that such is to be inferred. This letter is inconsistent with the warrant, and with the order of revocation, and the Board should not be permitted to hold the two opposite positions at one time. When petitioners returned home after their discharge by Judge Underwood, in December, 1948, they were informed that they were not on parole. In April, 1949, they were informed that the Board had decided to restore their parole status. They have been on parole since and are now on parole.

Brief on Motion to Dismiss.

I.

The proceedings for review of an order or judgment in a habeas corpus proceeding may be dismissed if ground therefor appears.

39 C.J.S., Sec. 118, p. 730.

II.

Frequently an appeal is dismissed on the ground that the only questions involved are or have become moot or academic. * * *

39 C.J.S., Sec. 118, p. 730.

III.

Where a reversal would not be effectual nor beneficial to the complaining party, the judgment of the trial court may be affirmed.

5 C.J.S., Sec. 1852, p. 1336.

IV.

Notwithstanding an irregularity in the proceedings in the lower court, the judgment may be affirmed where, by reason of the happening of subsequent events, no real controversy any longer exists between the parties and, on account of the questions involved having become abstract, a new trial would be of no advantage to appellant or plaintiff in error.

5 C.J.S., Sec. 1852, p. 1337.

V.

"On a habeas corpus, where the personal liberty of the citizen is involved, our decision should be made upon the actual status of the case. This record discloses that the term of the second sentence of the appellee has expired, and, although he did not service the full period of his imprisonment by reason of his discharge by the court below, the time which he lawfully should have served has now expired. To direct a reversal of the order of the court below would be to do a vain thing. * * *

The only formal order we can now enter is an order dismissing the appeal, in view of the expiration of the second sentence of the appellee pending the consideration of this appeal by this court. *United States* v. *Mills*, 11 App. D. C. 510, 511.

As the appeal must be dismissed, it is now so ordered."

Harris v. *Lang*, 7 L.R.A. (N.S.) 124, 132, 27 App. D. C. 84, 93, 7 Ann. Cas. 141.

VI.

In habeas corpus proceeding by prisoner against penitentiary warden, wherein prisoner's sentence expired through a good time allowance pending appeal from order remanding prisoner to the custody, and prisoner was released on parole for the remainder of his maximum sentence, appeal must be dismissed on ground that prisoner was no longer in warden's custody or control.

Van Meter v. *Sanford*, 99 F. 2d 511.

VII.

Where petitioner had been discharged from custody after appeal from order denying petition for writ of habeas corpus was lodged in Circuit Court of Appeals, appeal was dismissed as "moot".

Odell v. *Sanford*, 128 F. 2d 616.

VIII.

Where question in habeas corpus proceeding was whether, as contended by prisoner, term expired on April 2, 1941, or on January 26, 1942, as contended by warden, and appeal from order discharging writ came on for hearing on January 28, 1942, so that regardless of which contention was correct, prisoner's term had expired and prisoner had been released from custody, appeal was rendered "moot" and would be dismissed.

Pyron v. *Squier*, 129 F. 2d 310.

IX.

Where petition for writ of habeas corpus was granted a conditional release pending appeal from judgment denying the writ, the case became "moot" and appeal was dismissed.

Weber v. *Hunter*, 157 F. 2d 926.

X.

Where petitioner was released from penitentiary because of his good conduct while his appeal from judgment denying his petition for writ of habeas corpus was pending, petitioner's contention of his wrongful detention became moot and appeal was dismissed.

Bledsoe v. *Johnston*, 164 F. 2d 481.

XI.

Where a prisoner is enlarged on parole, after he presents his petition, the effect is to do away with any basis for the habeas corpus.

Stallings v. *Splain*, 253 U.S. 339.
Wales v. *Whitney*, 114 U.S. 564, 570.
McNalley v. *Hill*, 293 U.S. 131, 138.
Re Callicot, Federal Case No. 2,323.
Ex Parte Herrera, 137 Pac. (2) 82, 83.

The Order of Remand

If we are compelled to return to the trial court, pursuant to the remand, permit us to request consideration in this Honorable Court of the remand order.

If the direction of the Appeals Court remains as written, the trial court will endeavor to follow the law of the case, and will be bound by it. Permit us to suggest that it would be helpful if Your Honors would make clear what might be expected of us, upon a new trial. The Appeals Court said, herein p. ...., that we might have leave to enlarge our pleadings. Our petition for habeas corpus has served its purpose and is defunct. As Your Honors know, the function of a petition for habeas corpus is to secure the issuance of the writ, and when that is issued, the petition has accomplished its purpose. In essence, it is merely preliminary, and ordinarily is not to be considered as part of the pleadings. The issue on which the trial and determination takes place is regularly raised on the return and the traverse thereto. 39 C.J.S. sec. 80, p. 625. *Jung Woon Kay* v. *Carr*, 88 F. 2nd 297. The answer, or traverse to the return, is the petitioners' pleading. 39 C. J. S. sec. 99, p. 666. But there is nothing in the return R. 39, 99, concerning any revocation:

Our traverse was directed to the response concerning the warrant. The warden has not incorporated any revocation, or asked to have such included in the pleadings. The Appeals Court should have directed the manner in which the new issue should be made. More important still—what standard should be used by the trial judge in determining if we are able to show the orders revoking paroles to be a nullity? Is the burden upon us? Must the warden show more than the fact that he has received a paper in the mail? If the Board has a discretion, which is not to be reviewed, how are we to show total nullity?

If the law is as stated by the Appeals Court, that parolees have no rights except such as may be granted in the discretion of the Board. In such case, Your Honors will recognize the futility of a trip to the trial court.

If Your Honors should reverse the Appeals Court and should conclude that the case should be remanded, Your Honors may see fit to draw up another remand order, in the light of this record. Your Honors might say something like this:

> The trial court is directed to permit the respondent to show cause, if any exists, as to why the judgments should be vacated, and to that end, respondent may apply, if so advised, to enlarge his pleadings, so as to present, if he can, legal orders revoking these paroles.

Before making such order, Your Honors must consider that the Government attorneys once had an opportunity to proceed properly. We must assume that they were sufficiently familiar with the practice to have tendered a proper return, and to have attempted a showing. No need of giving them a second chance, if their conduct was deliberate. The entire record reflects their attitude. If they can not be permitted to stand upon their position—perhaps

they had rather have Your Honors reverse the Appeals Court and affirm Judge Underwood than to tell exactly how the Board arrived at its decision.

In *Johnson* v. *Chin Ah Yeit*, 14 F. 2nd, 953, from an order discharging relator, the Commissioner appealed. It was held that the District Court improperly tried the issue whether the alien was the son of an American citizen, without first ascertaining that there was some defect in the proceedings before the Commissioner. We quote:

> "Under these circumstances the next question is whether the case should be sent to the court below for a trial of the jurisdictional question or whether on the present record this court should determine that question. We think the latter is the proper course."

Whereupon the Circuit Court examined the evidence in the record and decided the issue against the alien. The order of the District Court discharging the alien from custody was set aside, the writ discharged, and he was remanded to the custody of the Commissioner.

We suggest that the opposite result is within the power of this Honorable Court. Your Honors have enough of the facts in the record to make a final disposition here, one way or another. If Your Honors agree with our contentions and uphold the trial court, a mere affirmance would suffice, together with a reversal of the Appeals Court, but Your Honors have the power to enter a more complete judgment, taking into consideration the revocation, as well as the reinstatement of petitioners on parole. In cases coming from federal courts, Your Honors are given full power to enter such judgment or order as the nature of the certiorari requires. 28 U.S.C.A. sec. 347. *Camp* v. *Gress*, 250 U.S. 308, 318; *Donovan* v. *Pennsylvania Co.*, 199 U.S.

279; *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 67, 68. 36 C.J.S. § 204 p. 122.

In some cases writs of certiorari have been allowed to review judgments of Circuit Courts of Appeal, which have reversed judgments of the trial court and have remanded for new trial, where this Honorable Court concluded that the writ should be allowed without further protracting the litigation.

Stringfellow v. *Atlantic Coastline R. Co.*, 290 U.S. 322;

City and County of Denver v. *New York Trust Co.*, 229 U.S. 123, 133.

The New York Judgment

It was held in *Richardson* v. *Shuttleworth*, 75 Fed. Supp. 631 that a habeas corpus proceeding at place of detention was proper method for determination, on proofs *aliunde* the record of conviction and sentence, which record was made in another district, whether federal court was without jurisdiction because of deprivation of constitutional right. Citing *Johnson* v. *Zerbst*, 304 U. S. 458.

A federal court judgment that is reached without due process of law is void and may be attacked collaterally by habeas corpus, if for crime. *Bass* v. *Hoagland*, 172 F. 2nd 205.

Plain error will be noticed and acted upon, even where the point has not been assigned as error on appeal to the Circuit Court.

Silbach v. *Wilson & Co.*, 312 U.S. 1, 16.

Mahler v. *Eby*, 264 U.S. 32.

Due process is a requirement that cannot be satisfied by mere notice and hearing if there has been contrived

conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of a court and jury by the presentation of testimony known to be perjured.

Mooney v. *Holohan,* 294 U.S. 103, 113.

Known falsity of indictment as to venue

In *United States* v. *New York Great Atlantic and Pacific Tea Company,* 137 F. 2d 59, the trial court sustained a demurrer to the indictment.

In the case at bar, our position is much stronger than that of the defendants in the *Atlantic and Pacific case.*

It appears, from the entire record, that the positive direct allegation of the indictment, that the conspiracy was formed in New York is not only false but it was known to be false by the prosecutor and the grand jury. When we endeavored to prove our facts, Judge Underwood sustained the objection made by the Government attorneys, based upon the statute which requires that application be made to the court of conviction, whereupon we were permitted by Judge Underwood to make an offer of proof. We submitted the entire record in the *New York case,* which record had been printed for use in *United States* v. *Compagna,* 146 F. 2nd. 524. This record was certified by Judge Underwood to the Court of Appeals as an exhibit, and in turn will be certified by the Clerk of the Appeals Court. It is the same record upon which Your Honors denied certiorari in 324 U.S. 867.

The Appeals Court said, herein p. 151:

> "The district judge declined for want of proof to hold invalid the sentences, which were attacked as based on perjured testimony knowingly used, and on a conviction for a conspiracy as made in New York, but really made, if at all, in Chicago. Moreover, Re-

vised Title 28, Sec. 2255, requires that such an attack be presented to the court which tried the case."

This statement is correct on the surface, but misleading. There was no proof because Judge Underwood believed that he should not entertain the point. But Judge Underwood allowed us to make an offer of proof, so the point has been preserved as one of law and procedure.

If Your Honors agree that our proof should have been heard, we are able to demonstrate error.

We submit that the case of *De Mayo* v. *United States*, 32 F. 2nd 472, will throw some light upon the problems presented in the case at bar. In the *De Mayo case*, certain overt acts were committed by government agents. The agents were incompetent under the facts to become conspirators. It was held that their acts could not furnish proof of venue in the district where the indictment was found. In the case at bar, none of the defendants performed any act in New York. If they ever acted in New York, as far as this case is concerned, they were in New York by virtue of the agency which the alleged conspiracy was supposed to create in Bioff, Browne and Circella. If by reason of the exceptions in the Anti-Racketeering Act, these labor people were incompetent, under the facts, they were in the same category as the government agents in the *De Mayo case*.

The petitioners were removed from their homes in the Chicago area, Illinois. The indictment alleges in no unmistakable terms, that the conspiracy was formed within the jurisdiction of the New York court. No effort was made to prove this allegation. If we assume, from all of the evidence, that the formation of the conspiracy was proved at all, it was entered into in Illinois. No other claim was made by the prosecutor. We refer your Honors to the closing argument of the prosecutor (R. 3639) where

he referred to the origin of the alleged conspiracy in Illinois.

In *United States* v. *Safeway Stores,* 51 F. Supp. 448, the trial court sustained a demurrer to indictments under the Sherman Act. Although the court recognized that a good indictment could be drawn without any allegation of overt acts, it was necessary to allege overt acts in the jurisdiction of the court. The conspiracy had been formed elsewhere. The trial court finally concluded that the attempt at a venue allegation was insufficient.

We are not confined to the indictment. We bring your Honors the evidence. Your Honors will perceive, from the evidence, that in the case at bar, the formation of plans and policies which would include, of course, the formation of the alleged conspiracy is foreign to the New York judicial district. No defendant has his residence in New York. None was found in New York.

If this indictment had alleged that the conspiracy had been formed in Illinois without any further allegation, the courts of the home district would never have ordered the removal of these defendants, nor would any waiver on removal have been accepted. The defendants consented to removal in order that they might meet the charge in the indictment, *i.e.*, that they conspired in New York. The policy of the law, and fairness, does not admit of the removal of a defendant on one charge, to be eventually convicted of another. We submit that this defect alone is vital and fatal to this conviction.

As was said in *United States* v. *Smith,* 173 F. 227, 232:

> "If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if the government has that power, and can drag citizens from distant states to the capital

> of the nation, there to be tried, then as Judge Cooley says, this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial."

This point was also urged upon the court in a motion for a directed verdict. (R. 2630, AE 106)

Our point might be summarized as follows: Where an indictment alleges the formation of the conspiracy in a district as the sole basis of venue, without alleging the commission of any overt act in furtherance of the conspiracy, and the proof shows the formation of the conspiracy in another district, the trial Court is without jurisdiction even though there be proof of the commission of unalleged overt acts within the trial district.

We presented this claim of known falsity of indictment as to venue to the United States Court of Appeals. That Court in affirming the judgment, *United States* v. *Compagna*, 146 F. 2nd 524, treated the point as if it were an attack upon the form of the indictment and failed to pass upon the claim made. This Honorable Court denied certiorari *United States* v. *Compagna*, 324 U.S. 867. It is our contention that the affirmance of the judgment, nor the denial of certiorari, precludes this attack upon the jurisdiction of the original trial court.

Our point concerning the known falsity of the venue allegation can be proved from the record made at the original trial. Judge Underwood refused to consider it, for the reason that the Government attorneys objected on the ground that the statute, Sec. 2255 Title 18 requires that such points be presented to the trial Court. It is our contention here that that statute should be disregarded as an undue burden upon habeas corpus.

In *Martin* v. *Hiatt*, 174 F. 2nd 350, Section 2255 Title 28

U.S.C.A. is set out and it was held in an opinion by Judge Waller that this section did not violate the provision of the Constitution guaranteeing the right to the writ. *Cline* v. *Hiatt*, 174 2nd 822. In *St. Clair* v. *Hiatt*, 83 F. Supp. 585 Judge Underwood has expressed some of his views concerning Sec. 2255. In *Stidham* v. *Swope*, 82 F. Supp. 931 Judge Denman held that a motion in the court of sentence would not be required where such motion would require delay. Our position in the case at bar is to be compared with that of petitioner in the *Stidham case. cf. Lowe* v. *Humphrey*, 80 F. Supp. 442, *Davis* v. *Humphrey*, 80 F. Supp. 513. *Mugavero* v. *Swope*, 86 F. Supp. 45.

On Motion for Rehearing in Appeals Court.

When the Appeals Court admitted having made mistakes as to the record, it failed to perceive how it should have perceived that the mistaken notion formed a foundation in the original opinion.

Judge Rogers was a member of the Board when the paroles were granted and issued the warrants. He defended his conduct before the Congressional Committee. Dr. Killinger came on the Board after the paroles were issued, but he testified that he had studied the files, and before Congress endeavored to defend the Board. The reason why any court should get the facts straight is that these officials should be judged in the light of their knowledge and conduct.

The reason why the Appeals Court should have gone back and revised its conclusions was that it based its first one upon the premise that these prisoners had been given notice of the charges before Dr. Killinger invited counsel to Washington. The fact is that they had been given no notice to this day. Judge Underwood correctly appraised

the referrals as of no value. We submit that the Appeals Court is wrong on the law, as to the requirements of due process, whether we accept the facts, as thought to exist by that Court, or if we dig into the record and ascertain what really happened.

We refer Your Honors to the opinion of Judge Biggs in *Hicks* v. *Hiatt*, 64 Fed. Supp. 238 on the principle of the totality of errors. By reason of the totality of errors there was a denial of due process of law.

Respectfully submitted,

A. WALTON, NALL,

WM. SCOTT STEWART,

Counsel for Appellees.

APPENDIX

Opinion by Judge Sibley.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 12715

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Appellant,

versus

LOUIS COMPAGNA and CHARLES GIOE,
Appellees.

Appeal from the District Court of the United States for the Northern District of Georgia.

(November 10, 1949.)

Before HOLMES, WALLER, and SIBLEY, Circuit Judges.

SIBLEY, Circuit Judge: Appellees Compagna and Gioe were convicted, together with others, in the Southern District of New York and each received a sentence of ten years imprisonment, affirmed UNITED STATES v. COMPAGNA, et al., 146 F. 2d 524, certiorari denied, 324 U. S. 867. Having served one-third of their sentences they were placed on parole August 13, 1947. Unfavorable newspaper publicity followed, and an investigation was had by a committee of Congress of the operations of the Parole Board and particularly of this case. The Board members who granted these paroles were out of office, and the then members testified they knew of no ground to revoke them. The committee, however, reported, among other things, that the Board had agreed to take definite action by June 19, 1948, on the committee's request that these paroles be revoked. On July 21, 1948, Judge Rogers, one of the three Board members, issued warrants in the usual form reciting that "reliable information has been presented to the undersigned member of this Board that the said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice"; and ordering his arrest and return to the penitentiary. Both parolees were promptly arrested and brought to the Atlanta Penitentiary. Each on September 2, 1948, filed a lengthy application for habeas corpus, attacking the validity of their trial and sentence; and attacking the warrants issued by Judge Rogers because of the Congressional enquiry and the testimony therein of each Board member that there had been no breach of parole. The applications further alleged there had not since been any breach of parole and Judge Rogers had no reliable information of any; that the Board had appointed a hearing for September 8, 1948, but had announced no counsel would be heard. The prayers were that the Court declare

he conviction and warrants to be void and the Board without jurisdiction; and alternatively that the Board be ordered to return the parolees to their home in Chicago where they were arrested, and give them a hearing there according to the Administrative Procedure Act, with counsel and witnesses present and a reporter furnished by the Board or paid by applicants. The applications set out the grounds which the Board had notified each applicant would be investigated as justifying the revocation of his parole. On September 20, 1948, the applications were amended to allege that two members of the Board, not including Judge Rogers, had in Atlanta on September 8 conducted a hearing in which applicants denied the charges made against them and were cross examined on them, a Court reporter taking notes, but that no other evidence was introduced and representation by counsel was denied, and the Board refused to comply with the Administrative Procedure Act; and that the matter was continued and referred to Washington.

The only respondent named is the Warden of the Atlanta Penitentiary, who is not a member of the Board. He answered that he was holding the applicants for habeas corpus under their original sentences, and under the warrants of Judge Rogers which he said were valid; that the Administrative Procedure Act had no application, but the parole system was a thing *sui generis*, administered by the discretion of the Board and exempt from judicial review by the language of the Administrative Procedure Act; and that the conduct of the Board is not reviewable by habeas corpus, parole being a matter of grace and not a legal right.

The responses were traversed, habeas corpus writs issued, and a full hearing was had on the two petitions together. Interrogatories of like tenor were propounded to Judge Rogers, and to the other two members of the

Board, one of whom was appointed since the Congressional investigation. Judge Rogers was away from home and made no answers. Chairman Killinger answered that counsel had asked to meet with the Board but had been refused because that procedure was not required by the Parole Statute and was not followed by the Board; that he was advised that the Administrative Procedure Act is inapplicable to the Board; that in reply to counsel's request he had written an exhibited letter, enclosing a copy of the Board's Rules and Regulations, and giving assurance that only conduct since parole would be considered; that the Board would be glad to confer with counsel at its office in Washington or consider any pertinent information in behalf of the parolees, but it had never been the Board's policy to admit counsel to its deliberations or when it interviews the prisoner; that the procedure of a criminal trial was not necessary to a determination of the question whether the welfare of society would be promoted by the granting, revocation, or modification of a parole. It concluded: "To sum up, it is our position that a formal hearing of the kind you seek is not provided for by the statute. We shall, however, be glad to have you submit in writing, or in person at our headquarters, any material or information bearing on these cases." He further testified that all appearances of prisoners before the Board are stenographically reported, running into hundreds at every meeting of the Board, the notes are transcribed in Washington and each case thereafter separately considered by the Board members, so that some delay is inevitable; but that there would be no unnecessary delay in deciding the cases of applicants. Several interrogatories he declined to answer, and the Board's files he refused to produce, because they involved matters then pending before the Board for decision. Board member Monkiewicz

answered to the same effect. No effort was made to force further answers.

The district judge declined for want of proof to hold invalid the sentences, which were attacked as based on perjured testimony knowingly used, and on a conviction for a conspiracy as made in New York, but really made, if at all, in Chicago. Moreover, Revised Title 28, Sec. 2255, requires that such an attack be presented to the court which tried the case.

The district judge apparently thought the Administrative Procedure Act, 5 U. S. C. A. Sec. 1001, and following, has no application to the procedures of the Parole Board in granting paroles, revoking, or modifying them, though he did not expressly so rule. It has never been thought applicable by the Board or the Attorney General who appoints its members and approves its rules. The full dress procedure it requires would render it practically impossible for the Board to handle its business. A prisoner sentenced to the penitentiary is turned over by the court to the executive, namely the Attorney General, to have the sentence executed. That the term may be shortened by good conduct, or that the imprisonment may be ameliorated by serving it outside the prison walls on parole (See ANDERSON v. CORALL, 263 U. S. 193, 196) is a legislative grace and not a thing of right. The legislature may affix such conditions and provide such administration as it will. Courts have no function, except as the statutes give them power. As respects parole, the original statutes, as well as the revision now of force, bristle with discretion given the Board, and are silent about court interference. Revised Title 18, Sec. 4202, provides that certain classes of prisoners "may be released on parole". Section 4203, prescribing no sort of hearing, and leaving it to the "opinion of the Board", says

"the Board may in its discretion authorize the release of such prisoner on parole", under conditions fixed "in the discretion of the Board", he remaining "in the legal custody and under the control of the Attorney General". Section 4205 provides: "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced." Section 4206 requires designated officers to execute the warrant "by taking such prisoner and returning him to the custody of the Attorney General", that is, to the prison. Section 4207, is: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof." There is nothing in the present statute, of force since September 1, 1948, requiring that the warrant be based on "reliable information" as stated in the former Title 18, Section 717. It is very evident that the whole matter of paroles is left to the informed discretion of the Board. Court action is not made a part of it. The Administrative Procedure Act, in authorizing court review of the acts of the agencies which it governs, as to them excludes such action when "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 5 U. S. C. A. Sec. 1009. Certainly no review of what the Board is doing or has done can be undertaken by habeas corpus where the Board is not a party, and no such directions can be given it as these applications pray for.

The district judge, however, held that the uncontradicted testimony of the two applicants was that Judge Rogers could have had no "reliable information" of parole

violation, for there was no violation, and his warrants, issued in August, 1948, were void, ignoring the change in the statute effective September 1, 1948, and that the Warden could not hold the prisoners though the Board had already interviewed them and had under advisement the revocation of their paroles. On December 4, 1948, he gave judgment for the discharge of the applicants from custody after fifteen days, unless within that time the Board or a member becomes possessed of reliable information of parole violation during the fifteen days and a new warrant is issued.

Within the fifteen days the Board rendered an order revoking the paroles, and certification thereof was made to the Warden. He made a motion to reconsider the judgment and presented this order to the court, and asserted that he now holds custody, not under the warrants of Judge Rogers, but under the order of the Board revoking the paroles. This motion was entertained and a show-cause order granted. Without further evidence the motion was denied on the ground that, "the revocations of parole were based on illegal Parole Violator Warrants and were issued without fair hearings and in my opinion are invalid." The only basis for saying there was no fair hearing is this recital in the judgment: "On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the members of the Board declined to even state what violations of the parole were charged and indicated that no hearings would be granted petitioner other than the 'appearances' they had had before the Board. These 'appearances' fall far short of the fair hearing which the law contemplates." Appeals are taken from both judgments.

1. The district judge incorrectly states that the Board declined to state what violations of parole were charged. At the time of arrest each prisoner was notified in writing of the charges, three against Compagna and five against Gioe; and each exhibited his notice in his original pleading. If the warrants were irregular, they served to bring the parolees before the Board, which has a continuous and exclusive jurisdiction over them in respect of their paroles. They knew the charges against them, and were given the "appearance" which the statute says shall be afforded them. The law does not provide for any other "hearing". Irregularity in the arrest of an alien does not invalidate deportation proceedings otherwise conformable to law. UNITED STATES ex rel. BILOKUMSKY v. TODD, 263 U. S. 149, 158; nor in general does an unlawful arrest prevent a court from trying one on a valid charge of which it has jurisdiction; 22 C. J. S., Criminal Law, § 144; 14 Am. Jur., Criminal Law, § 219. Parole revocation is informal and discretionary, and we see no need of starting afresh with a new warrant, if after affording due "appearance" the Board is satisfied that parole ought to be revoked, and has revoked it. The warrant has become unimportant.

2. The Chairman, Dr. Killinger, was not a Board member when the Congressional enquiry was made. None of the present members had anything to do with the grant of the paroles then under enquiry. They are under no incapacity to do their duty. The Chairman by letter offered to let counsel come before the full Board in Washington and present any material or information bearing on the cases, though he declined to have a full scale trial. This was not unfair. The refusal to answer some interrogatories was due to the belief, we think well grounded, that the court had no part in the Board's deliberations about the paroles. The requirements as to procedure in

the Administrative Procedure Act have no application to the Parole Board. Its procedure is fixed by a later statute, Revised Title 18, Chapter 311, Parole. We are aware that in FLEMING v. TATE, 156 F. 2d 848, it was held that the statute, then 18 U. S. C. A. Sec. 719, in stating that a paroled prisoner returned to custody "shall be given an opportunity to appear before said board of parole", meant he should have an effective hearing, including assistance of counsel, and the long practice otherwise was unlawful. The decision would seem to invalidate on habeas corpus a vast number of parole revocations. Congress, in revising the parole law, Revised Title 18, Sec. 4207, changed the wording to read: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board." This change cuts deeply into the idea that the appearance is to be a trial. An examiner may conduct it now, and it would seem that the taking of the testimony of the prisoner, and perhaps his witnesses, is alone contemplated. The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, following the appearance in person of the prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear. We think the district court erred in holding the orders revoking those paroles are nullities, not justifying the Warden in holding the prisoners.

3. When ANDERSON v. CORRALL, 263 U. S. 193, was decided, the Warden of a penitentiary was always a member of its board of parole, and he was specifically authorized to issue a warrant for a parole violator. He was a proper person to defend an attack on the board by habeas corpus. Under the present law the Warden has no part in

parole matters, knows nothing about what the Board does in Washington, and is in no position to explain or defend its proceedings. The use of habeas corpus against the Warden to reach a wrong in the Board's procedure, if there be such, is not to be encouraged. In BOWERS v. DISHONG, MARSHAL, 103 F. 2d 464, this Court held that habeas corpus would not lie to test judicially whether parole violation had occurred. Again in FOX v. SANFORD, 123 F. 2d 334, we held habeas corpus was not available to test the sufficiency of information of parole violation to justify the Board's warrant. The Sixth Circuit, in UNITED STATES v. BARC, 141 F. 2d 480, held that a court should not by habeas corpus interrupt the procedure by the Board which the statute prescribes. The Fourth Circuit, in UNITED STATES v. NICHOLSON, 78 F. 2d 468, held that the remedy for the Board's failure to give a proper appearance before it is not habeas corpus, but a direct proceeding in mandamus against the Board in the District of Columbia. A similar ruling was made in UNITED STATES v. DILLARD, 102 F. 2d 94. If a revocation of a parole can ever be attacked collaterally by habeas corpus against the Warden, it ought to be nullified only on plain evidence and a full hearing. The district court here held that the warrant was invalid and that all that followed was void, and did not try at all the Warden's pleading presenting the orders of revocation, but hastily condemned them on the further ground that the hearing was unfair, and released the prisoners from the Warden's custody.

The judgments appealed from are reversed and the appellees are directed to be remanded to the custody of the Warden, with leave to the applicants, if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held.

Dissenting Opinion by Judge Waller.

WALLER, Circuit Judge, dissenting:

In my study of this case the following viewpoints have developed:

1. The Appellees were lawfully paroled.

2. Between the dates of their parole and their re-arrest and reincarceration, they had committed no violation of the conditions of their parole.

3. That the Parole Board, neither at the time of the issuance of the warrant declaring the parolees to have violated the conditions of the parole and to be fugitives from justice, nor at the time of revocation of parole, had any "reliable information", or information of any kind, that the parolees had violated the conditions of parole.

4. That the provisions of the statute requiring the Board, after the issuance of a warrant and before revocation of parole, to afford parolees an opportunity to appear before the Board, were intended to require the Board to comply with the Constitutional prohibition against the deprivation of liberty without an opportunity to be heard, and the appearance allowed parolees in this case afforded no such opportunity to be heard as the law and the Constitution contemplate.

5. That one who has rightfully earned and lawfully achieved parole has a status—call it what you will—which he has the right to defend and of which he cannot be deprived except by due process of law, to be afforded either by the Board or, upon its failure, by the courts.

6. Neither adverse newspaper criticism of the granting of parole or a demand or request by a sub-committee of the Committee on Expenditures in the Executive Department of Congress can lawfully supplant the requirement

of the statute for "reliable information of violation of parole".

7. That the Parole Board cannot rightfully revoke a parole lawfully granted without cause or grounds for such revocation and the failure of the Board to acquaint either the parolees or the Court below with any grounds for the revocation of the parole should be taken as proof not only that there *were* no such grounds but also should be taken as a deprivation of liberty without due process.

8. The case must be judged by the law as it existed July 1, 1948, or at the time of the issuance of the warrants for the arrest, and not by the New Judicial Code of September 1, 1948.

9. The fact that a criminal trial may be lawful despite the fact that the defendant was taken on an invalid warrant of arrest, as analogized in the majority opinion, seems inapt here. The trial in a criminal case is on an indictment or information whereby, if conviction results, the defendant may be deprived of his liberty. It is the indictment or information that informs the defendant of the charges and what he shall be expected to meet. In a revocation of parole it is the warrant of arrest that deprives him of his liberty and that should acquaint him of the thing with which he is charged.

10. Neither newspapers, sub-committees, political repercussions, whims, or capriciousness, singly or collectively, without more, justifies the incarceration or reincarceration of an individual longer than it is reasonably necessary to afford him a full and fair hearing on charges adduced against him.

11. Notwithstanding the pronouncement of the Board to the sub-committee that it, like Pilate, found no fault

in the parolees since their release, and notwithstanding the refusal of the Board members to answer interrogatories or to divulge, either to the parolees or to the lower Court, any reliable information as to any violation of parole, these men have been cast back into custody from which no relief can come if the Board is above the law.

The facts, as found by the Court below, are without any contradiction in the evidence and I think that its judgment should be affirmed.

Supplemental Opinion rendered upon denial of Rehearing.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 12715

WILLIAM H. HIATT, Warden, U. S. Penitentiary, Atlanta, Ga.,

Appellant,

versus

LOUIS COMPAGNA and CHARLES GIOE,

Appellees.

Appeal from the District Court of the United States for the Northern District of Georgia.

(December 16, 1949.)

ON MOTION FOR REHEARING.

Before HOLMES, WALLER, and SIBLEY, Circuit Judges.

By The Court: The opinion of the court seems to be inaccurate in stating that no member of the present Parole Board was such when the paroles were granted, Member Monkiewicz appearing to have continued as such throughout; and in stating that each prisoner was given written notice at the time of his arrest of the charges of parole violation made against him, the fact being that the written

charges were formulated then, and it not appearing when they were made known to the prisoners. Each knew them on Sept. 2, 1948, six days before the hearing before the Board, and each alleged them fully in the applications then filed for habeas corpus. These inaccuracies are immaterial to the decision made.

Since neither Judge who concurred in the judgment desires a rehearing, the motion therefor in the above named and numbered case is denied.

WALLER, Circuit Judge, concurring in the result:

I adhere to my original dissent but agree that under our Rule 29 the motion for rehearing should be denied.

A True copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

Opinion by Judge Lindley.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 9788

THE UNITED STATES OF AMERICA, ex rel. **PAUL DeLUCIA,** Petitioner-Appellee, vs. **THOMAS P. O'DONOVAN, United States Marshal,** Respondent-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Michael L. Igoe, Presiding Judge.

BEFORE MAJOR, CHIEF JUDGE, FINNIGAN AND LINDLEY, CIRCUIT JUDGES.

OPINION

Before MAJOR, *Chief Judge*, FINNEGAN and LINDLEY, *Circuit Judges*.

LINDLEY, *Circuit Judge*. Respondent arrested the relator pursuant to a parole warrant issued by a member of the United States Board of Parole. On the day he was taken into custody, June 15, 1948, relator filed a petition for a writ of habeas corpus, to which, on the same day, respondent filed a formal return. Relator then filed a lengthy traverse, to which respondent demurred. The District Court

overruled the demurrer and ordered respondent to answer within ten days; respondent, however, elected to stand by his demurrer, whereupon the court entered judgment discharging relator.

Respondent asserts error in that, (1), the judgment was based upon certain statements appearing in the relator's traverse, which, because they are, as respondent argues, conclusions of law rather than allegations of fact, were not admitted by the demurrer; (2), the court, having no authority to shorten the statutory time within which the return to the petition for writ of habeas corpus might be filed, wrongfully required respondent to file his return *instanter;* and, (3), the court was precluded from reviewing the facts upon which the parole board's jurisdiction was based until the administrative proceedings initiated by the issuance of the parole warrant had been completed.

The relator, with others, had been found guilty of conspiracy to violate the Anti-Racketeering Act, United States Code, Title 18, Section 420, and sentenced to a term of ten years. After he had been released on parole, in August, 1947, a congressional subcommittee conducted an investigation into the grant of paroles to relator and his fellow conspirators. Hearings began September 25, 1947, and ended June 7, 1948. On June 15, 1948, Fred S. Rogers, a member of the parole board, issued a warrant reciting that he had reliable information that relator had violated the conditions of his parole and directing that he be arrested. On the day following relator was taken into custody upon this warrant and immediately filed his petition for a writ of habeas corpus.

On June 16, 1948, the court directed that the writ issue returnable *instanter.* Less than three hours later, a return was filed, showing that respondent had custody of relator by virtue of the warrant, and alleging that, because the

court was without jurisdiction to review the issuance of such warrant by a member of the United States Parole Board or to inquire into the custody of one who was held under it, the petition failed to disclose any ground upon which relief could be granted. To this return, the relator filed a traverse, the pertinent parts of which averred that at the hearings conducted by the subcommittee, Mr. Rogers, the member of the board who issued the warrant, had testified on June 7, 1948, barely a week before issuance of the warrant, that relator had not violated the conditions of his parole. The relator included also his own affidavit that he had not at any time violated the terms of his parole. To this traverse, respondent demurred. The court overruled the demurrer, *U. S. ex rel. De Lucia* v. *O'Donovan*, 82 F. Supp. 435, and directed respondent to answer within ten days. When respondent elected to stand on the demurrer, the relator was discharged.

Since a judgment may not be reversed for error not of prejudicial nature, *Deery* v. *Cray*, 5 Wall. 793, *Gilman* v. *Higby*, 110 U. S. 47, *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99, *Seaboard Air Line* v. *Moore*, 228 U. S. 433, we need not consider the contention that the District Court erred in ordering a returnable *instanter*, for, although respondent contends that under the applicable statute (28 U. S. C., Section 456) he should have been given three days within which to file his return, it is clear that no prejudice has resulted from the order that the return be filed immediately.

The pertinent statute, Title 18 U. S. C., Section 717, is: "If the warden of the prison or penitentiary from which said prisoner was paroled or the Board of Parole or any member thereof *shall have reliable information that the prisoner has violated his parole*, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized

to execute the same, for the retaking of such prisoner." (Emphasis supplied.) The trial court, having considered the specific averments of the traverse, found that it alleged specifically that no member of the board had any information of violation of any of the terms and conditions of De Lucia's parole when the warrant was issued and that this allegation was admitted by respondent's demurrer to the traverse.

Respondent argues that the pleadings do not support the conclusion; he contends that, because a demurrer admits only such facts as are well pleaded, he did not admit that the warrant was issued without any information relative to a parole violation by the relator, that being a conclusion of law rather than a mere allegation of fact. The relator insists that this argument constitutes a departure from the position taken by respondent in the court below, where, if the objection had been raised, relator could have met it by amending his pleading.

The record made in the District Court supports relator's statement that respondent failed to attack the sufficiency of petitioner's pleadings in the trial court. Consequently, he should not be allowed to do so for the first time in this court. Moreover, the respondent's argument, considered on its merits, seems to us to overlook the fact that this court, in resolving this issue, must go beyond a simple determination of whether, as an abstract proposition, a demurrer admits an allegation that a warrant has been issued without any information as to a parole violation; it must decide also whether, upon all the allegations of fact which were unquestionably admitted by respondent's demurrer, the trial court was justified in concluding that there was no information with respect to any such violation in the possession of the board member who issued the warrant.

Respondent's position with respect to this issue is best

illustrated by the following quotation from his brief: "The petitioner's statement that he did not violate parole in the interim is his own conclusion and is not admitted by respondent's demurrer. As a matter of hard logic, the *petitioner will have to allege facts concerning every moment of every hour from June 15, 1948.* That he has not done. There is nothing before the court in the pleadings to show what activities, innocent or otherwise, the relator was engaged in during this period. *In the absence of such allegations the petitioner's conclusion that he did not violate parole cannot be admitted.*" (Emphasis supplied.) To adopt this viewpoint in a case where, as here, the facts have been alleged in great detail (petitioner's traverse was some 625 pages in length) would be to impose an unreasonable burden on the pleader as well as an unrealistic limitation on the lower court. We conclude that respondent's contention must be rejected on the merits, especially in view of the fact that it has been urged for the first time in this court. 4 C.J.S. 465, citing cases.

In this connection the District Court said: "De Lucia's traverse to the Marshal's return to the writ does not contend that the information upon which the parole board member issued the warrant was not reliable. The traverse alleges substantially that the members of the parole board did not have any information in respect to a violation of the terms and conditions of De Lucia's parole when the warrant was issued. It alleges that the member of the board who issued the warrant had previously testified before the Congressional Committee that no report or evidence of a violation of parole by De Lucia had been received by the board. And it asserts that the parole warrant was issued solely because the parole board member had been pressed to such action by the legislative committee. The legal effect of the demurrer filed by the United States Attorney acting on behalf of the parole Board member is to say that even

if all of the allegations in the traverse are true, nevertheless the detention of De Lucia under the parole warrant is legal and may not be inquired into by this court." We cannot reject a finding of the trial court unless it is clearly erroneous. Federal Rules of Civil Procedure, rule 52, 28 U. S. C. A. following section 723c, *Sunal* v. *Large*, 157 F. 2d 165 affirmed 332 U. S. 174, *Farrell* v. *Lanagan*, 166 F. 2d 845; *Willis* v. *Hunter*, 166 F. 2d 721, *United States* v. *Niersheimer*, 166 F. 2d 87. The record here is such that we cannot say as a matter of law that the findings are erroneous.

Respondent contends also that the rule requiring the exhaustion of administrative remedies, precluded the court below from discharging the relator from custody. His position is that, under the rule, the District Court was barred from making a determination of invalidity of the warrant until after completion of the parole board hearing, the culmination of the administrative proceeding provided for by statute (18 U. S. C. A., Sections 717, 719 and 723) and inaugurated by issuance of the warrant. Respondent insists that this holds true in all cases save one,—where the parole warrant has been issued arbitrarily. The admitted existence of this exception to the rule seems to us decisive in the case now before this court, for to us it seems clearly arbitrary and capricious to issue a parole warrant without any information relative to a parole violation by the one against whom it is directed, when, as here, the statute makes "reliable information" a necessary condition precedent to a valid warrant. It may well be that had there been, in this case, any information on the part of the board member who issued the warrant that petitioner had violated his parole, the court would have had no power to interfere and determine whether that information was or was not reliable. *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371; *Christianson* v. *Zerbst*, 89 F. 2d 40, 10th Cir., *Rogoway* v. *Warden*, 122 F. 2d 967, 9th Cir., *United States ex rel.*

Jacobs v. *Barc*, 141 F. 2d 480, 6th Cir. But here it was admitted by respondent's demurrer that there was no information of any violation by relator. The court was correct in concluding that under such circumstances, issuance of the warrant was "arbitrary and capricious and not warranted by law," and the remedy of habeas corpus available to the petitioner. *Clark* v. *Surprenant*, 94 F. 2d 969, 9th Cir., *Christianson* v. *Zerbst*, 89 F. 2d 40, 10th Cir.

In *Varney* v. *Warehime*, 147 F. 2d 238 at 243, 6th Cir., c. d. 325 U. S. 882, the court said: "Appellants insist that this action was brought prematurely because appellees had not exhausted their remedies under the procedural regulations of the Director of Good Distribution. Failure to exhaust administrative remedies generally precludes resort to the courts. *Highland Farms Dairy, Inc., et al.* v. *Agnew et al.*, 300 U. S. 608, 616, 57 S. Ct. 549, 81 L. Ed. 835; *Natural Gas Pipeline Company* v. *Slattery*, 302 U. S. 300, 311, 58 S. Ct. 199, 82 L. Ed. 276. However, this is not an ironclad rule and it has no application where the defect urged goes to the jurisdiction of the administrative agency. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772."

In the last mentioned case, the government insisted that petitioners seeking an injunction against the Interstate Commerce Commission, should have applied to the Commission for definite rates before resorting to jurisdiction in equity. The court denied the contention, Mr. Justice Brandeis speaking for the court, saying: "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49, 5

L. ed. 83, 88, 32 Sup. Ct. Rep. 22; *Louisiana & P. R. Co.* v. *United States,* 209 Fed. 244, 251; *Atlantic Coast Line R. Co.* v. *Interstate Commerce Commission,* 194 F. 449, 451. The Sacramento Case (*United States* v. *Merchants & Mfrs. Traffic Assoc.,* 242 U. S. 178, 61 L. ed. 233, 37 Sup. Ct. Rep. 24) was a case of this character. Compare *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, 92, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; *Southern P. Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 298. The district court properly assumed jurisdiction of this suit." See also *Goldman* v. *Am. Dealers Service,* 135 F. 2d 398; *U. S. Alkali Assoc.* v. *U. S.,* 325 U. S. 196.

From the cases cited it seems clear that where it is asserted and the proof shows that the administrative body has failed to comply with the statute and has, therefore, acted without statutory authority, the District Court has jurisdiction of the proceedings. The rule requiring exhaustion of administrative remedies does not apply when the administrative body has exceeded its statutory authority.

The case of *Hiatt* v. *Compagna and Gioe,* — F. 2d —, recently decided by the Court of Appeals for the Fifth Circuit, involved issuance of parole warrants for the arrest of two persons who, having been tried with and convicted at the same time as the relator in this case, had also been released on parole. After they had been taken into custody (it is significant that they were arrested after September 1, 1948, the date on which Revised Title 18, United States Code, became effective), Compagna and Gioe filed petitions for habeas corpus. Prior to hearings on their petitions, the board conducted a proceeding to determine, whether their paroles should be revoked. Before this hearing had been concluded, however, the habeas corpus hearings were completed, and the District Court found, on the

basis of the uncontradicted testimony of the two petitioners, that information upon which the warrants had issued was not reliable. It was accordingly ordered that petitioners be released unless, within 15 days, new warrants based on reliable information had been issued. No such warrants having been issued, although the board did announce its decision that the paroles should be revoked, the District Court ordered that the petitioners be discharged. On appeal, the judgment was reversed, the Court of Appeals relying on the fact that Revised Title 18 had made substantial changes in the procedure to be followed in revoking paroles.

Several distinctions can be drawn between the case before this court and the one in the Fifth Circuit. The most obvious is that the latter case was decided under a statute entirely different from that which controls here. Here the issuance of the warrant, the arrest of petitioner, and the issuance of the writ all occurred before the effective date of Revised Title 18; consequently, this court must look to the law under the former statute (18 U. S. C. A., Sections 717, 719 and 723). Another distinction, readily apparent, is that the relators in the Fifth Circuit were notified in writing of the parole violations with which they were charged, whereas the relator in this case was never made aware of any conditions of his parole which he was charged with violating. There, the finding of the District Court was that the information on which the warrants had been issued was not reliable; here, the court found that there was no information of any kind whatever. These significant distinctions serve to resolve the otherwise apparent inconsistency in the decisions in the two cases.

The judgment is affirmed.

Opinion by Judge Underwood.

82 F. Supp. 295

Compagna v. *Hiatt; Gioe* v. *Hiatt.* Nos. 2329, 2330 U. S. District Court N. D. Georgia, Atlanta Division, Dec. 4, 1948.

Motions for Reconsideration Denied Dec. 20, 1948.

Consolidated habeas corpus proceedings by Louis Campagna and Charles Gioe against W. H. Hiatt, warden, United States Penitentiary, Atlanta, Georgia.

Judgments for petitioners in accordance with opinion.

Andrews & Nall, of Atlanta, Ga., and William Scott Stewart, of Chicago, Ill., for petitioners.

J. Ellis Mundy, U. S. Atty., and Harvey H. Tisinger, Asst. U. S. Atty., both of Atlanta, Ga., and A. E. Gottshall, Sp. Asst. Atty. Gen., for respondent.

UNDERWOOD, District Judge.

The above cases were, by agreement of the parties,
A-1 tried together because they involve identical questions of law and substantially the same facts.

These findings of fact and conclusions of law are
A-2 entitled in both cases and filed therein as findings and conclusions in each case, respectively.

Petitioners, after conviction by a jury, were on the 31st day of December, 1943, in the United States Dis-
A-3 trict Court for the Southern District of New York, sentenced to terms of ten years imprisonment upon an indictment charging violation of the Anti-Racketeering Act, 18 U.S.C.A. §§ 420a-420e (now § 1951).

They were, on August 13, 1947, released on parole. They remained at large on parole until arrested on July 23, 1948, upon Parole Violator Warrants dated

A-4 July 21, 1948 and signed by Judge Fred Rogers, Member of the United States Board of Parole. They were immediately thereafter returned to the Federal Penitentiary in Atlanta, Georgia.

Petitions for writ of habeas corpus were presented to this Court on behalf of both petitioners on Septem-
A-5 ber 2, 1948, and rules to show cause why the petitions should not be granted were issued the same day and made returnable, to meet the convenience of the parties on September 20, 1948.

After hearing on September 20th writs of habeas corpus were issued, returnable on an agreed date, October 25, 1948. The cases were then heard. Evi-
A-6 dence was introduced, oral argument heard, and counsel granted upon their request, until November 22, 1948, to file principal briefs and three days thereafter to file reply briefs.

(1) Petitioners allege as grounds for writs of habeas corpus that the original sentences of the District Court for the Southern District of New York
A-7 are void because the Court was without jurisdiction, it being claimed that the offense was not committed in New York, and because conviction was obtained by perjured testimony, known by the prosecutor to be such.

The evidence does not support these contentions
A-8 and they are without merit. Discharge, therefore, on these grounds is denied.

Petitioners further allege as additional grounds that their present restraint is unlawful because they are held by virtue of Parole Violator Warrants which
A-9 are void because not based on reliable or any information of violation of parole, and because they have been denied, since their return to the peni-

tentiary, the kind of hearing to which they are entitled under the law.

The statute, 18 U.S.C.A. § 717 (now § 4205), applicable in these cases, authorizing revocation of parole, provides that if the Board of Parole, or
A-10 any member thereof, shall have reliable information that the prisoner has violated his parole, a member of the Board may issue a warrant for the retaking of the prisoner.

(2) The authority of the Board is strictly statutory and limited by the terms of the Act. A member of the Board has no power to issue a Parole Violator
A-11 Warrant except in compliance with conditions imposed by the Act. If issued without compliance, it is a nullity and arrest thereunder unlawful. A person so arrested is entitled to relief as from illegal restraint.

(3) An express condition precedent to the issuance of a Parole Violator Warrant is that the issuing authority "have reliable information that the pris-
A-12 oner has violated his parole." This is in the nature of a jurisdictional requirement and may be inquired into by competent authority.

(4) However, if there is some substantial information of a parole violation possessed by the Board member at the time he issues the warrant, a court
A-13 will not inquire into the reliability of the information, that is properly for the determination of the Board member in the exercise of a fair and real discretion.

But the information must be considered reliable by him and must be substantial and relate to parole violation occurring subsequent to the grant of parole, except in special circumstances not present in these cases. Otherwise the issuance of the warrants would

be arbitrary or capricious, which the law never permits. In probation cases, which are analogous to
A-14 parole cases, the courts have pointed this out particularly. "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." *Burns* v. *United States*, 287 U. S. 216, 223, 53 S. Ct. 154, 156, 77 L. Ed. 266. The Court of Appeals for the Fourth Circuit, also in a probation case, say: "It is not conceivable that Congress intended to confer upon the court the power to call back the defendant at any time within five years after conviction and imprison him, no matter how blameless his conduct may have been during the interim, or how strictly he may have observed the terms of his probation. It follows that, whenever it is charged that a probationer has failed to follow the instructions of the court, he may not be sentenced until he has been given notice of the specific charge and an opportunity to be heard in his defense and until the court, upon hearing, shall have judicially determined that his conduct during the probation period has not conformed to the course outlined in the order of probation." *Hollandsworth* v. *United States*, 4 Cir., 34 F. 2d 423, 428. It would seem that Congress had in mind at least as strict rules for the governing of the Parole Board as for the courts.

The crucial question here presented is—did Judge Rogers, the member of the Board who issued the
A-15 warrants on July 21, 1948, have at that time any information of a parole violation?

One would think that this would be a very simple and easy fact to determine, but it has become complicated by the refusal of Judge Rogers and the other
A-16 Board members to testify as to the fact or to deny petitioners' testimony that there was no violation,

and by failure of respondent to show, or tender proof of, any violation or information relating to parole violation.

If the fact justified it, statement of the information
A-17 acted upon would have brought a quick and easy end to the cases.

(5) However, respondent and the Board have chosen to rely solely on their claim that the Court may not inquire into the matter, but must accept as a conclusive presumption that the warrants were based on reliable information, although the evidence adduced and unrebutted shows that there was no violation and therefore no reliable information upon which to base the warrants. Petitioners' claim seems
A-18 to be supported, not only by their testimony, but also by statements made by Board members, admitted by them, before a congressional committee which was investigating the paroles, and by the refusal of the Board to even advise petitioners of the charges against them. These statements and their refusal to say what charges of parole violation were claimed or what information they had at the time the warrants were issued, appear from the very uninformative answers given to the interrogatories propounded to them by petitioners.

If Judge Rogers possessed reliable information, he might have, in his discretion, either withheld or issued the warrant; but if he had no such information,
A-19 there was no room for the exercise of discretion and no authority to issue the warrants. Their issuance would be a nullity and restraint thereunder unlawful.

There is a presumption of the legality of the warrant, but it is not a conclusive presumption and it

has been overcome by the evidence in the case. The Court must decide the case upon the evidence before it. If as a matter of fact the Board did have information of parole violation which would support the
A-20 warrant, but elected to withhold it in the face of the positive evidence of its non-existence for technical reasons, for example, to test its jurisdiction or for other reasons, the Court can not go beyond the record and speculate what might be true or what evidence might have been offered, but must take the case as proved and decide it on the evidence adduced.

On the present record, therefore, the Court accepts as proved that no information of violation of parole was possessed by any Board member, at the time the
A-21 warrants were issued, creditable affirmative evidence to this effect having been adduced at the trial and not rebutted or denied.

The distinction must be borne in mind, that this proceeding is not an attempt to invade the jurisdiction or infringe upon the discretion of the Parole Board to pass upon the question of parole violation and propriety of revocation, but it presents the legal
A-22 question as to whether conditions precedent to the exercise of its jurisdiction and discretion in issuing the warrants have been shown. The first proposition is a matter of discretion as to which the courts will not interfere. The second involves the question of illegal restraint into which the courts will inquire.

From the evidence in these cases and the contentions of respondent, the position taken by him and the Parole Board appears to be that when a Parole Violator Warrant is once issued by a member of the Board, even if not based on any information reliable or otherwise, the Court may not inquire into its

validity, although competent evidence is offered to prove the non-existence of such information and the respondent does not deny its non-existence or offer any proof of its existence. To accept such contention
A-23 would be to deny to a person illegally restrained the protection against arbitrary and capricious acts which the law affords every one. *Burns* v. *United States*, 287 U. S. 216, 53 S. Ct. 154, 77 L. Ed. 266. No authority has been presented to support this contention. On the other hand, a statement by Mr. Justice Brandeis in the case of *Bilokumsky* v. *Tod*, 263 U. S. 149, 153, 44 S. Ct. 54, 56, 68 L. Ed. 221, seems to establish the contrary in the following words: "It is also true that, if the Department makes a finding of an essential fact which is unsupported by evidence, the court may intervene by the writ of habeas corpus."

This expression was made in a deportation case
A-24 but the principle announced is applicable in this case.

In another deportation case the Supreme Court say: " 'It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a
A-25 condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.' " *Mahler* v. *Eby*, 264 U. S. 32, 45, 44 S. Ct. 283, 288, 68 L. Ed. 549, citing and quoting from *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59, 43 S. Ct. 51, 67 L. Ed. 124.

Evidence of non-violation of parole was admitted

over objection of respondent that the Board had not finally acted, not to justify release on the ground that there was no violation, but as evidence tending to show, along with other evidence, that Judge Rogers
A-26 did not have reliable information of violation at the time he issued the warrants and that they were therefore void. It was not a question of violation of parole, but a question of possession of information by Judge Rogers. It is an attack on the validity of the Warrants, not on the exclusive right of the Board to Pass upon the question of parole.

The cases cited by respondent in support of his contention are cases where there was involved discretion of the Board after hearing and not an attack on the warrant of arrest prior to a hearing. In the case of *Christianson* v. *Zerbst*, 10 Cir., 89 F. 2d 40, 42, cited by respondents, the Court said: "A warrant cannot issue in the absence of any information. Its issuance without information would be capricious and without basis in law. But, when information is at hand, its reliability is a matter for the board or the member, as the case may be, to determine; and that determination is conclusive in a proceeding of this kind." This principle is not questioned, but the
A-27 issue here is whether or not there was any information. The attack upon the warrant in the *Christianson* case was not made until after a hearing and after the parole was revoked. There was positive evidence, adduced in the habeas corpus hearing, that the Board had information from a reliable source that Christianson was drinking, abusive to his family, had threatened to kill a member of the family, and was guilty of other violations. The Court held on the evidence presented that there was sufficient informa-

tion to justify the issuance of the warrant and that its reliabiliy was a matter for the Board.

In the case of *Rogoway* v. *Warden*, 9 Cir., 122 F. 2d 967, 968, the Court held that "The issuance of the warrant for arrest was not improper for, as outlined above, the Parole Board was possessed of some in-
A-28 formation the reliability of which was within its determination", and did not hold that the warrant could issue in the absence of substantial evidence of violation.

In the Fifth Circuit cases, the attacks on the warrant were made after hearing and the revocation of parole. The Court held in *Fox* v. *Sanford*, 5 Cir., 123 F. 2d 334, 335, that, "As provided by statute Fox was
A-29 given a hearing before a member of the Board of Parole, and the reliability or sufficiency of the information upon which the Board acted is not a matter for determination by the courts in a proceeding for habeas corpus."

In *Bowers* v. *Dishong*, 5 Cir., 103 F. 2d 464, 466, the issue was whether or not the Parole laws applied to prisoners on parole under conditional release. The Court held that they did and that "the Board of
A-30 Parole shall have the exclusive authority to issue warrants for the re-taking of any United States prisoner, who has violated his parole". The validity of the Parole Violator Warrant was not in question.

It will be observed that in none of the cases cited was the validity of the warrant attacked, at least
A-31 not until after hearing and final revocation of parole, and not attacked, as here, upon the ground that there was no evidence at all to support the warrant.

Where a person has been arrested on an illegal warrant and has submitted without objection to a hearing

properly conducted before the Parole Board, which has resulted, on substantial evidence, in finding him guilty of violating his parole and in the revocation of his parole, he will be held to have waived the defect in the warrant and the revocation will be upheld. But if the warrant is claimed to be void because illegal, and prompt objection to restraint thereunder is made, as in these cases, the Court may properly inquire into the restraint and discharge the parolee if it finds the warrant illegal. In these circumstances, a parolee
A-32 need not wait indefinitely for determination of his case by the Board, but may apply to the courts for relief by writ of habeas corpus. The justice of such a rule is apparent when, as shown by this record, petitioners have been in restraint under the Parole Violator Warrants since July 23, 1948, and the Board has stated that it could not say when a final decision in the cases would be reached, that sometimes it required several months after hearing to reach cases for final determination. Assuming that the warrants are void and the restraint illegal, this would mean that petitioners would be illegally confined for an indefinite period without any opportunity to have the legality of their detention adjudicated.

Respondent and the Board contend that to permit the Court to pass upon the validity of the warrants at this stage of the proceeding would "divest the Board of the jurisdiction committed to it by Congress", and that the Court could not even hear testimony offered to show that the Parole Violator Warrants are illegal. The Board may consider it of importance to establish a precedent that its action in the issuance of the Parole Violator Warrants was beyond the power of courts to inquire into, but in view of the fact that the Board, where a warrant is illegally issued, may

at any time on reliable information, issue a new war-
A-33 rant based on parole violation happening at any time subsequent to the granting of the parole and before the termination of the original sentence, it would not seem to be a matter of serious inconvenience or miscarriage of justice. But be this as it may, I think to uphold such position would be to uphold an arbitrary act and not the exercise of discretion. Furthermore, the law looks upon the liberty of the citizen as a matter of very grave importance, and to claim that by an arbitrary act an agency of the Government could hold an individual in restraint for an indefinite period of time without opportunity to test its validity can not be upheld.

(6) From the evidence in these cases, I find that the Parole Violator Warrants in question were invalid
A-34 and that the restraint thereunder is illegal. This being true, the time honored relief of habeas corpus should be granted in these proceedings.

In a similar habeas corpus proceeding, *United States of America ex rel. De Lucia* v. *O'Donovan, Marshal*, N. D. Ill., 82 F. Supp. 435, Judge Igoe has
A-35 discharged De Lucia, who was a co-defendant of petitioners in the New York indictment, on a writ of habeas corpus upon substantially the same facts and contentions of law as made in the present cases.

In view of the foregoing findings of fact and conclusions of law, it is not necessary to consider the
A-36 other grounds of the petitions for writ of habeas corpus.

(7) The Federal courts "have power to grant writs of habeas corpus for the purpose of an inquiry into
A-37 the cause of restraint of liberty", 28 U.S.C.A. § 452 (now § 2241) and after hearing, "to dispose of the

party as law and justice require." 28 U.S.C.A. § 461 (now § 2243).

Under these sections the Court may properly delay the discharge of petitioners for such reasonable time as may be necessary to allow opportunity for an appeal if desired and also to allow opportunity for the issuance of new Parole Violator Warrants, based
A-38 on reliable information, should the Board or a member thereof possess or become possessed of such information and issue new warrants within the period of delay allowed. *Mahler* v. *Eby*, 264 U. S. 32, 46, 44 S. Ct. 283, 68 L. Ed. 549; *Dawes* v. *Gough*, 5 Cir., 1948, 170 F. 2d 396.

Judgments will issue in accordance with the fore-
A-39 going with stay of execution of the judgment for a period of fifteen days.

Supplemental Opinion by Judge Underwood.

On Motions for Reconsideration of Judgments.

(8) The above motions came on for hearing on this day upon rules issued December 17, 1948, and counsel
A-40 were heard. Counsel advised the Court that they did not desire to present further evidence or argument.

On December 4, 1948, judgments in the habeas corpus proceedings were entered discharging petitioners from custody. The judgments were final, but
A-41 execution of them was stayed for fifteen (15) days for two purposes only—to allow time for appeal or for issuance by the Parole Board of valid Parole Violator Warrants. Neither action was taken.

These motions request reconsideration of the judgments for the sole reason that the Parole Board has
A-42 now revoked the paroles, such action having been taken on December 16, 1948.

On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the
A-43 members of the Board declined to even state what violations of the parole were charged and indicated that no hearings would be granted petitioners other than the "appearances" they had had before the Board. These "appearances" fall far short of the fair hearing which the law contemplates.

If the motions were granted, there is no reason to
... suppose that upon reconsideration the Court would
A-44 be met with anything but silence similar to that encountered at the hearings already had and nothing would be gained.

The revocations of parole were based on illegal
A-45 Parole Violator Warrants and were issued without fair hearings and in my opinion are invalid.

The motions are denied.

Opinion by Judge Igoe.

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82 Fed. Supp. 435.

United States ex rel. De Lucia v. *O'Donovan*, No. 48C867, United States District Court, N.D. Illinois. E.D. Nov. 10, 1948.

Habeas corpus proceeding by the United States of America, on the relation of Paul De Lucia, against Thomas P. O'Donovan, marshal. The marshal filed a return to which the relator filed his traverse. A demurrer was filed to the traverse.

Demurrer overruled.

William Scott Stewart, of Chicago, Ill., for petitioner.

Otto Kerner, Jr., U. S. Atty., of Chicago, Ill., for respondent.

Igoe, District Judge.

On June 16, 1948, Louis Campagna, Paul De Lucia, Phil D'Andrea and Charles Gioe filed their petition in this court for the writ of habeas corpus. The petition alleges that the petitioners had been convicted and sentenced to serve ten years in a federal penitentiary after a trial on an indictment returned by a federal grand jury in the United States District Court for the Southern District of New York; that
A-46 said indictment charged the petitioners and other defendants with conspiracy to violate Section 420A (now § 1951), Title 18 U.S.C.A. known as the Federal Anti-Racketeering Act by extorting money from certain motion picture producers; that the judgment was affirmed by the Circuit Court of Appeals and

after the petitioners served one third of the sentences imposed, they were granted paroles.

The petition asserts that the judgment of conviction
A-47 in the District Court of New York is void because, among other thing it resulted from perjured testimony.

The petition further alleges that since the paroles were granted to the petitioners, a committee of Congress has conducted an investigation in an attempt to show that the paroles were brought about by corruption and undue influence and should not have been granted; that the committee seeks to compel the present members of the Parole Board to revoke the paroles; that although the petitioners have not
A-48 violated the conditions of their paroles, members of the Parole Board have told the Congressional Committee that action will be taken on said paroles; that the petitioners have requested a hearing before the Parole Board before any action is taken to revoke the paroles but this request has been refused. A five volume copy of the transcript of the Congressional Committee hearings was filed with the petition.

Although the Parole Board had not yet revoked the paroles when the petition for the writ of habeas corpus was filed, the petition requests that should such action be taken by the Parole Board, this court
A-49 issue the writ and grant the petitioners a hearing to determine if there is any evidence to support such action and to grant whatever relief is necessary to assure to the petitioners due process of law.

On June 15, 1948, Fred D. Rogers, one of the members of the Parole Board, signed and issued a warrant for the arrest and return to the federal penitentiary of the petitioner Paul De Lucia. The warrant

recites the judgment of conviction in New York and
A-50 the release of De Lucia on parole on August 13, 1947. It states that reliable information has been presented to the member of the Parole Board whose name is affixed to the warrant that the paroled prisoner named in the warrant has violated the conditions of his parole and that said prisoner is declared to be a fugitive from justice.

On June 16, 1948, the United States Marshal of this District executed the parole warrant by taking De Lucia into custody. Thereupon this court issued
A-51 the writ of habeas corpus returnable forthwith. On the same day the Marshal produced the prisoner in court and filed his return to the writ.

The Marshal stated in the return that De Lucia was held under the parole warrant; that the petition for the writ did not state a cause of action because this court is without jurisdiction: (a) to review the judgment of conviction in New York; (b) to review
A-52 the action of a member of the Parole Board in issuing a warrant; and (c) to inquire into the custody of a prisoner being held under a parole violation warrant until after the parole board has held the hearing on the warrant that is required by Section 719 (now § 4207) of Title 18 U.S.C.A.

De Lucia furnished bond and is now at liberty under the writ pending determination of the issues.
A-53 The other two petitioners were not brought before this court and are not parties to this proceeding.

An amendment to the Marshal's return was filed on July 8, 1948, denying that De Lucia was being
A-54 illegally restrained under the New York judgment and denying and putting in issue the allegations of the petition in that respect.

On July 7, 1948, De Lucia filed his traverse to the Marshal's return. The traverse alleges that De Lucia's parole was issued in good faith by the Parole Board; that there is no basis in fact or law for its revocation; that a hearing will disclose that there
A-55 has not been any violation of the conditions of the parole; and that the warrant was issued arbitrarily without just cause. The traverse also recites the testimony of different members of the Parole Board given at the Congressional Committee hearings on different dates. It alleges that Judge Rogers, the member who signed the warrant, testified before the Committee on June 7, 948, that the Parole Board had not received any reports of parole violation by De Lucia. It recites testimony by other members of the board that although De Lucia was being watched by the FBI and the Chicago police, no report of violation had been received from the parole office in Chicago, notwithstanding that the board members knew of no instance where a parole had been revoked without the complaint coming from the parole officer. Other allegations in the traverse attacking the evidence supporting the conviction in New York are disregarded because the writ of habeas corpus cannot be used as a means of securing a review or modification of the judgment of conviction upon which a petitioner's custody and detention are based. *Story* v. *Rives*, 68 App. D.C. 325, 97 F. 2d 182.

The United States Attorney acting in the Mar-
A-56 shal's behalf, filed a demurrer to the traverse.

(1) The function of the writ of habeas corpus is to provide the prisoner with an immediate hearing to
A-57 determine whether his detention is legal and whether it is justified by law. *Clark* v. *Surprenant*, 9 Cir., 94 F. 2d 969.

Section 716 of Title 18 U.S.C.A. combined with the later enacted sections 723a and 723b furnish the member of a parole board with authority to release prisoners in federal penitentiaries who apply for parole to return to their homes upon such terms and
A-58 conditions as the Board of Parole shall prescribe. During the period of parole, the prisoners remain in the legal custody and under the control of the warden of the prison from which they were paroled until the expiration of the original sentence. Section 716, Title 18 U.S.C.A.

Section 717, 18 U.S.C.A. authorizes the issuance of a warrant for retaking a prisoner who has violated
A-59 the conditions of his parole. This section reads as follows:

> "If the warden of the prison or penitentiary from which said prisoner was paroled, or said Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner."[1]

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[1] Effective September 1, 1948, the sections of Title 18 quoted above were superseded by Sections 4201-4207 of Title 18. The newly enacted Section 4205 deals with the issuance of parole warrants and is worded much differently than the old Section 717, and does not contain the proviso of the old Section 717 with respect to the Board Members having "reliable information."

Since the parole warrant involved here was issued on June 15, 1948, this proceeding involves the older sections of the statute which were in effect on that date and it is not necessary in this proceeding to construe the newly enacted sections which did not become effective until September 1, 1948.

Section 717 was amended in 1930 and again in 1940 by Section 723c so as to invest exclusive authority to issue a warrant for the retaking of a prisoner for
A-60 violation of parole in the members of the Board of Parole. However, the conditions on which such a warrant may be issued remain as they are stipu ted in the original Section 717.

Section 719, 18 U.S.C.A. provides that a hearing
A-61 shall be given by the Board of Parole to a prisoner who has been retaken by a parole warrant. This section reads:

> "When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced." 54 Stat. 692, § 3.

It is noted that Section 717 provides that if a member of the parole board shall have *reliable information* that a prisoner has violated his parole,
A-62 he may issue a warrant for the retaking of said prisoner.

De Lucia's traverse to the Marshal's return to the writ does not contend that the information upon which the parole board member issued the warrant was not reliable. The traverse alleges substantially that the members of the parole board did not have any information in respect of a violation of the terms

and conditionse of De Lucia's parole when the warrant was issued. It alleges that the member of the
A-63 board who issued the warrant had previously testified before the Congressional Committee that no report or evidence of a violation of parole by De Lucia had been received by the board. And its asserts that the parole warrant was issued solely because the parole board member had been pressed to such action by the legislative committee.

(2) The legal effect of the demurrer filed by the United States Attorney acting on behalf of the parole Board member is to say that even if all of the allega-
A-64 tions in the traverse are true, nevertheless the detention of De Lucia under the parole warrant is legal and may not be inquired into by this court.

As I view this situation, the question that is presented by the demurrer to the traverse can be divided into two parts; (1) whether the member of the parole board was required under Section 717, as amended, to be in possession of some information relative to
A-65 violation of the parole before he could issue the parole warrant; and () does De Lucia have the right to have determined in this proceeding whether the Parole Board member had information of some kind in respect of violation of the parole before it issued the warrant or does the warrant itself preclude such an inquiry.

Counsel for De Lucia contends first, that the action of the Parole Board member in issuing the parole warrant is appropriately reviewable in habeas corpus
A-66 proceedings, and second, that a review of such action is expressly provided for in Sections 10(a), (b), and (c) of the federal Administrative Procedure Act, Title 5 U.S.C.A. § 1009.

A-67 Section 10 of the Administrative Procedure Act reads:

> "(a) Rights of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> "(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.
>
> "(c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

The parties have filed extensive briefs in this matter and arguments were heard by the court on two occasions. From the briefs and arguments, it appears

that there is no reported decision which involved the identical questions that are presented in the instant
A-68 proceeding. However, there are many reported decisions on questions closely related to the ones presented here. I believe that from these decisions can be found the legal principles necessary to the solution of the questions presented in the instant proceeding.

Can the validity of a parole warrant be inquired
A-69 into in a habeas corpus proceeding before the prisoner has been returned to the penitentiary?

In the case of *Clark* v. *Surprenant*, 9 Cir., 94 F. 2d 969, the warrant was issued by the parole board for the arrest of Surprenant who had been released on parole. The warrant recited that Surprenant had been sentenced to serve fifteen months and had been released conditionally from the United States penitentiary on April 15, 1936, and that the member of the board issuing the warrant had been presented with reliable information that the prisoner had vio-
A-70 lated the conditions of his parole. The warrant directed the prisoner's return to the penitentiary. Immediately upon his arrest, Suprenant filed his petition for the writ of habeas corpus. The United States District Court issued the writ and at the hearing it was shown that the parole warrant has been issued only a few hours before the full term of the sentence imposed upon Surprenant had expired. It was also shown that the prisoner had been paroled to a parole adviser in the northern district of Ohio and that one of the conditions of the parole was that the prisoner should not leave that district. Suprenant had, with the advice and consent of his parole adviser, gone from the northern district of Ohio to the southern district of California to live with his father.

At the hearing in the *Surprenant* case, the parole board contended that the district court was without jurisdiction to inquire into the lawfulness of the custody of the prisoner under the parole warrant, and that the prisoner first had to be taken to the penitentiary and remain there until the Parole Board had taken definite action by reviewing the parole
A-71 before any court could lawfully intervene. There, the Circuit Court of Appeals for the Ninth Circuit held that no such exclusive powers were conferred upon the Board of Parole. The court also held that the evidence established that the prisoner had not violated his parole; and that since the full term of his sentence had expired, the prisoner was entitled to his release.

(3, 4) Although in the *Suprenant* case, the court was influenced by the fact that the full sentence had expired before the hearing, the effect of the decision is to hold that a petition for the writ of habeas corpus is a proper proceeding to inquire into the lawfulness of the detention of a prisoner under a parole warrant before he has been returned to a penitentiary. That
A-72 case also established the further principle that if in a habeas corpus proceeding it is shown that the prisoner has not violated the conditions of his parole, the parole board cannot cause him to be returned to a penitentiary if the original sentence has expired. In holding the propriety of the writ of habeas corpus, the court said, 94 F. 2d at page 972:

> "The office of the writ of habeas corpus is to afford the petitioner a speedy and effective method of securing his release when illegally restrained of his liberty.
>
> "The writ lies in all cases of illegal imprisonment, by commitment, detention, or restraint,

for whatever cause, and under whatever pretense. The writ goes to inquire into the cause of imprisonment."

In the same case, Judge Mathews, in a concurring opinion, 94 F. 2d at page 974, upheld the right of the
A-73 district court to conduct an inquiry in a habeas corpus proceeding to determine the lawfulness of a prisoner's detention under a parole warrant:

"Appellant's brief states: 'The question involved is: Did the District Court have jurisdiction to inquire into the lawfulness of custody under a warrant issued by the United States Board of Parole before the Board has an opportunity to give appellee a hearing and take final action?'

"Thus, it is seen, the only question presented to this court is whether or not the District Court had jurisdiction of this case. Appellant contends that the District Court had no such jurisdiction. This contention is without merit. By Sections 751-761 of the Revised Statutes, as amended, 28 U.S.C.A. §§ 451-461 (now §§ 2241-2243), District Court and Judges thereof are expressly empowered 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty,' where, as in this case, the applicant 'is in custody under or by color, of the authority of the United States,' and thereupon 'to dispose of the party as law and justice require.' Such jurisdiction exists and has frequently been exercised in cases of this character. See for example, *United States* v. *Anderson*, 8 Cir., 76 F. 2d 375, cited by appellant, and *Christianson* v. *Zerbst*, 10 Cir., 89 F. 2d 40. The District Court had jurisdiction of this case."

In the case of *Christianson* v. *Zerbst*, 89 F. 2d 40, the Circuit Court of Appeals for the Tenth Circuit sustained the revocation of a parole in habeas corpus

proceedings brought after the prisoner had been returned to the penitentiary. It appeared that a
A-74 report of violations of parole had been sent to the parole board by the Children's Protective Society of Minneapolis. In construing Section 717, Title 18 U.S.C.A., the court said, 89 F. 2d at page 42:

> "The report constituted information. A warrant cannot issue in the absence of any information. Its issuance without information would be capricious and without basis in law. But, when information is at hand, its reliability is a matter for the board or the member, as the case may be, to determine; and that determination is conclusive in a proceeding of this kind."

(5) The foregoing quotation clearly demonstrates that the power granted in Section 717 to issue a parole warrant is limited to instances where the
A-75 members of the Board of Parole are in possession of reliable information that the parole has been violated.

Further insight on the limitations of the power that was bestowed by Congress on the Parole Board in Section 717 of the Statute is found in the decision
A-76 of the Supreme Court of the United States in the case of *Anderson* v. *Corall*, 263 U. S. 193, 44 S. Ct. 43, 68 L. Ed. 247. In construing the parole statutes in a case involving facts considerably different from those in the case at bar, the Supreme Court said, 263 U. S. at page 197, 44 S. Ct. at page 45:

> "Under section 6, the board was authorized at any time, during his term of sentence in its discretion, to revoke the order and terminate the parole, and to require him to serve the remainder of the sentence originally imposed without any allowance for the time he was out on parole."

(6) The statement of the Supreme Court in the *Corall* case that the Parole Board had power *in its discretion*, to revoke the parole is significant. Discretion involves the exercise of judgment. The exercise of discretion or judgment depends upon facts. Before the exercise of judgment or discretion can lead to the issuance of a parole warrant, some facts are needed. If, in the instant case, the parole board
A-77 did not have any information in respect of parole violations by De Lucia prior to the issuance of the parole warant, then under the principles drawn from the authorities above cited, it would not be possible for the parole board to use its discretion or judgment and, in the language of the case of *Christianson* v. *Zerbst*, the issuance of a parole warrant would be arbitrary and capricious and without basis in law. As was so clearly stated in the *Surprenant* case, the purpose of a writ of habeas corpus is to determine whether a person's imprisonment is without basis in law.

(7) Keeping in mind the principle stated by the Supreme Court in the case of *Anderson* v. *Corall*, that the power to issue a parole warrant lies in the discretion of the Parole Board or one of its members, the limitation of discretion as distinct from arbitrary
A-78 will which Congress placed upon the exercise of the power to issue a parole warrant was amplified by the same court in the case of *Escoe* v. *Zerbst*, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566. In construing the probation statutes applicable to the facts in that case, the court said, 295 U. S. at page 494, 55 S. Ct. at page 820:

> "The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed

offender. cf. *Snyder* v. *Com. of Mass.*, 291 U. S. 97, 116, 54 S. Ct. 330, 78 L. Ed. 674, (683), 90 A.L.R. 575."

(8) Although the reliability of the information that is in the possession of the members of the Parole Board when they issue warrants is to be determined by the Parole Board exclusively, *Christianson* v. *Zerbst*, 10 Cir., 89 F. 2d 40, the parole
A-79 board must have information of some kind in respect of a parole violation before the power to issue a parole warrant can be exercised.

In the case of *Rogoway* v. *Warden*, 9 Cir., 122 F. 2d 967, at pages 968, 969, which involved proceedings
A-80 similar to those in the case at bar, the court said:

> "The issuance of the warrant for arrest was not improper for, as outlined above, the Parole Board was possessed of some information the reliability of which was within its determination (*Christianson* v. *Zerbst, Warden*, 10 Cir., 89 F. 2d 40, 42), and conclusive so far as this proceeding is concerned."

The proposition that a parole board member cannot issue a warrant to revoke a parole without having some information on which he has exercised discretion and judgment is further established by the statement of the court in the case of *Bass* v. *Hiatt*, D.C. 50 F. Supp. 420. That case involved the right of the
A-81 attorney general to revoke a parole that had been granted to release a prisoner from the penitentiary for service in the armed forces. In upholding the right to recall the parole under Executive Order Jan. 18, 1941, No. 8641 because such revocation was within the discretion of the attorney general, the court said, 50 F. Supp. at page 422:

> "In the present case the Attorney General, and

his authorized representative the Director of the Bureau of Prisons, had the power to recall the parole under Executive Order No. 8641, and *such recall was for cause based upon information in their possession and therefore not an arbitrary or capricious exercise of that power* and whether the conclusion reached by the paroling authority (as a result of which the parole was recalled) was the correct conclusion on the facts before them is not a question for this Court in habeas corpus." (Emphasis supplied.)

The case of *Bowers* v. *Dishong*, 5 Cir., 103 F. 2d 464, has been cited as an authority for the proposition that the statute places no restraint whatsoever upon the power of a parole board member to issue a warrant for the revocation of a parole. In that case, immediately upon his arrest under the parole warrant the prisoner sought and obtained a temporary writ of habeas corpus. After the marshal filed his return showing that he held the prisoner under a parole warrant the District Judge dismissed the writ because the prisoner sought a hearing on whether a violation of the parole had occurred. The court was of the opinion that such a hearing would oust the jurisdiction of the board of parole and that ruling
A-82 was upheld on appeal. However, in the instant case, the issue is more fundamental. The traverse to the Marshal's return alleges that the parole board did not have any information of a violation of parole, and that the parole warrant was issued only because the memebers of the Board of Parole had been pressed to such action by the Congressional Committee without any information of parole violation. The demurrer which was filed to the traverse admits those allegations for the purpose of testing their sufficiency. Therefore, De Lucia is asking the court

to inquire into the legality of his detention under a parole warrant which was issued arbitrarily and capriciously and without being based upon information of any kind.

(9-11) Summing up the legal principles which I believe are fully supported by the cases discussed in this memorandum: (1) a parole warrant can lawfully be issued only in the exercise of discretion based on information. *Anderson* v. *Corall*, 263 U. S. 193, 44 S. Ct. 43, 68 L. Ed. 247; *Escoe* v. *Zerbst*, 295 U. S. 490,
A-83 55 S. Ct. 818, 79 L. Ed. 1566. (2) The parole warrant cannot lawfully issue in the absence of any information *and the issuance of a parole warrant in such circumstances is arbitrary and capricious and not warranted* by law. *Christianson* v. *Zerbst*, 10 Cir., 89 F. 2d 40; *Bass* v. *Hiatt*, D.C., 50 F. Supp. 420. (3) The office of the writ of habeas corpus is to afford the petitioner a speedy and effective method of securing his release if he is unlawfully restrained of his liberty. *Clark* v. *Surprenant*, 9 Cir., 94 F. 2d 969.

(2) Although there is a presumption of legality in favor of official action in revoking a parole, *Bass* v. *Hiatt*, D. C., 50 F. Supp. 420, *Harrell* v. *Aderhold*, 5 Cir., 73 F. 2d 189 such presumption is overcome in the instant case by the allegations in the traverse that the parole board was without any information whatever in respect of any violation by
A-84 the petitioner of his conditions of parole and that the parole warrant was issued solely because members of the parole board were pressed to such action by a legislative committee. For the purpose of ruling on the demurrer, those allegations stand as facts. The petitioner had produced witnesses in court to provide proof of the allegations in the traverse when the demurrer was filed.

(13) The court concludes that the duty is mandatory in this proceeding to determine whether the
A-85 detention of De Lucia under the parole warrant was legal and based upon information in the possession of the member of the Parole Board who issued the warrant, and therefore,

It is ordered that respondent's demurrer be and is
A-86 hereby overruled with leave to respondent to file his answer to the traverse within ten days.

(14) Turning now the applicability of the federal Administrative Procedure Act to the situation in-
A-87 volved here. Does the Act provide for review of detention under a parole warrant? If so, does the Act determine the scope of the review?

Section 10(a) of the Act provides that any person suffering legal wrong because of any agency action shall be entitled to judicial review thereof. If the parole warrant was unlawfully issued, certainly De Lucia's detention thereunder would be a legal wrong. In the words of Judge Sanborn in *Whitfield* v.
A-88 *Hanges*, Cir., 222 F. 745, at page 756, when De Lucia was taken into custody by respondent, the deprivation of his liberty was "present, instant, and continuing." Certainly, so far as the petitioner's immediate liberty was concerned, he suffered legal wrong if the parole warrant under which he was arrested was without any basis in law.

(15) Under Section 10(b) of the Act the forms of proceeding for judicial review may be by any applicable form of legal action including habeas corpus. The cases previously discussed demonstrate that
A-89 habeas corpus is the applicable form of legal action to review the matter presented here. Under this

Section of the Act, as the court said in *Snyder* v. *Buck*, D.C., 75 F. Supp. 902, at page 908:

> "A review may, for example, be had by an action for a declaratory judgment, by an action for a restraining or mandatory injunction, by a petition for a writ of habeas corpus, or some other fitting remedy."

Section 10(c) of the Act provides that every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Whether the arrest of De Lucia under the warrant issued by the member of the Parole Board constituted final agency action within the meaning of Section 10(c) so far as his present liberty was concerned may afford substantial grounds for respondent's contention that such action of the Parole
A-90 Board would not be final until De Lucia had been returned to the penitentiary, a hearing had been held there, and the Board had decided to revoke the parole. But even if that contention were correct, this section of the Administrative Procedure Act would not prohibit the instant proceeding. The Act does not forbid the use of habeas corpus in any situation. Nor does it forbid the review of an arrest under a parole warrant by habeas corpus proceedings.

(16, 17) As the Supreme Court said in construing the provisions of the Selective Service Act, 50
A-91 U.S.C.A. Appendix § 301 et seq., in the case of *Estep* v. *United States*, 327 U. S. 114, at page 120, 66 S. Ct. 423, 426, 90 L. Ed. 567:

> "For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them."

I incline to the view that the Administrative Procedure Act does not affect the instant proceeding

one way or the other. As the authorities hereinabove discussed show, deprivation of one's liberty has always been considered sufficient grounds to sup-
A-92 port habeas corpus proceedings. The Administrative Procedure Act does not purport to alter this legal practice of such long standing. This view is supported by the statements of the court in the case of *United States* v. *Watkins*, D.C., 73 F. Supp. 216, at page 219:

> "In other words, the Administrative Procedure Act does not in any way modify the existing forms of proceedings to review final actions of administrative agencies, nor does it create any new remedies if an adequate remedy is in existence."

(18) Even if the Administrative Procedure Act does not specifically authorize the instant proceedings to review an arrest under a parole warrant,
A-93 nevertheless the use of the writ of habeas corpus in testing the legality of any imprisonment has roots deep in our law.

I re-affirm the conclusion previously reached that this proceeding is proper to determine the question of whether the Parole Board or the member who signed the parole warrant had any information in respect of a violation of parole by De Lucia when
A-94 the warrant was issued. This is fortified by the statement of the court relative to the applicability of the Administrative Procedure Act to habeas corpus proceedings in *United States* v. *Carusi*, 3 Cir., 166 F. 2d 457, at page 461:

> "The fact that review has been judge-made out of the concept of due process does not make it any less a qualification of the statute than if the legislators had put the provision in it when the statute was first drawn.

Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 5

LOUIS COMPAGNA and CHARLES GIOE,
Petitioners,

vs.

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

I.

Opinions Below.

The opinions below are reported as follows:

Judge Underwood, 82 F Supp. 295, 300.
Sibley, 178 F2 42.
Waller, dissent, 178 F2 47.

Igoe, 82 F Supp. 435.
Lindley, 178 F2 876.

Judge Underwood filed two opinions. In the first opinion petitioners were ordered to be discharged. The actual release was delayed to give the Government time in which to do one of two things, *i.e.*,

1. to obtain a new warrant, or
2. to appeal.

On the expiration date of this extension the Warden did neither. He appeared with a copy of a revocation and requested a new trial. No further showing was made. In overruling this motion, Judge Underwood prepared an additional opinion. Upon appeal, Judge Sibley did not say that Judge Underwood was in error in the result adjudged in the first opinion. Although Judge Sibley differed with Judge Underwood on many important points involved. Judge Sibley held that Judge Underwood erred in holding that the order of revocation was a nullity. The burden of showing that the revocations are void was cast upon us.

The judgments were reversed with leave to amend, to the end that we might show if we can, that the revocation orders are nullities. Judge Waller wrote a dissenting opinion.

In a companion case, concerning the arrest of DeLucia in Chicago, Judge Igoe held the warrat to be void and jurisdictional. DeLucia was discharged. This judgment was affirmed, opinion by Judge Lindley. Copies of all of these opinions are appended to our petition for certiorari in this case.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.(1). Certiorari has been granted 339 U.S. 955.

III.

Questions Presented.

We respectfully refer Your Honors to our petition, p. 7, for the questions presented.

Since preparation of our petition for certiorari in the case at bar, we have studied the matter further and conclude that a favorable answer to the following questions will conclude this case.

After the trial judge decided that the warrant was void and jurisdictional, could the Board legally disregard this decision and continue on with its administrative proceeding to a revocation?

When the Warden produced a copy of an order of revocation and requested a new trial, did the trial judge do right in treating the order as a nullity? Had not the previous finding of the trial judge, concerning the warrant, become the law of the case?

IV.

Statutes Involved.

The parole statutes are set out in the opinion by Judge Igoe.

Section 4205, being the revised statute, in effect after the arrest in these cases, is set out in the opinion by Judge Sibley.

Section 10 of the Administrative Procedure Act is also set out by Judge Igoe.

Section 452, Title 28, Power of Judges; Place of entering order of circuit judge.

The several justices of the Court and the several judges of the Circuit Courts of Appeal and of the District Courts,

within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. (R.S. Sec. 752; Feb. 13, 1925, ch. 229; Sec. 6, 43 Stat. 940.)

Section 461, Title 28. Summary hearing; disposition of party.

The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. (R.S. Sec. 761.)

V.

Statement.

We believe that the facts are very well stated by Judge Underwood. The Government saw fit to submit the case, on our uncontested evidence, as one of law, taking the position that while the matter was pending before the Board, Judge Underwood had no jurisdiction. This position proved to be unsound. Reasons are given by Judge Underwood. Judge Sibley did not go as far as to hold with the Government on this jurisdictional attack. Judge Sibley said that he did not approve of the use of habeas corpus in matters of parole. Judge Igoe held that the argument made by the Government was unsound, as did Judge Lindley. We have contended from the beginning, that habeas corpus provides a proper relief from custody under a void parole warrant. The law upon this subject has been well stated by Judge

Underwood and Judge Waller. Also by Judge Igoe and the Court of Appeals for the Seventh Circuit.

Judge Sibley has held that after the warrant is executed it becomes of no importance and that the Board might legally proceed to a revocation, without reference to the warrant. Judge Waller said that this is not so. The opinion of Judge Sibley upon this subject also conflicts with that rendered by Judge Lindley.

We contend that this case must be reversed and Judge Underwood affirmed, regardless of whether Judge Sibley was right or wrong on this. Judge Sibley had not spoken at the time that the Warden appeared before Judge Underwood with the revocation orders. That said by Judge Underwood, at the time, about the warrants, was the law of the case. Judge Underwood had not only held that the warrants were void, but His Honor had said that a valid warrant was essential. It followed that any revocation predicated upon the void warrant was of no effect. There was no need of a new trial because the Judge had already decided that no further proceedings could be lawful.

VI.

Specification of Errors.

We respectfully refer Your Honors to our brief in support of our petition, p. 12, for a specification of errors.

We have added the following to our specification of errors.

The Court of Appeals erred in not holding that after the trial judge held that the warrant was void and jurisdictional the Board had no right to disregard this finding.

The Court of Appeals erred in not holding that all proceedings before the Board based upon the Warrants were of no effect and were properly disregarded by the trial court.

VII.

Summary of Argument.

1. We point out the conflict between the Appeals Courts in the Fifth and Seventh Circuits.

2. The warrants have been held to be void by the trial court. The Appeals Court brushes this aside and holds that they are of no importance. We contend and the lower court has held that a valid warrant is essential to jurisdiction.

3. The Appeals Court refuses to follow a decision rendered in the District of Columbia to the effect that a hearing is required by the statute. We contend that the trial court correctly decided this matter of statutory construction.

4. The Appeals Court is of the opinion that the Board has unlimited power and that everything is committed to its discretion. We submit that the trial court is correct in holding that a person paroled has some rights. It all resolves itself into a matter of construction of the statutes.

5. The Board members had no right to refuse to answer interrogatories because of a belief on their part that the trial court had no jurisdiction.

6. The familiar rule known as the law of the case should have been applied when the Warden asked for a new trial based solely upon revocations. The trial judge had decided that no valid revocation could follow a void warrant.

7. The Parole Board was the real party in interest and was bound by the judgment entered.

8. The trial court did not err in refusing a new trial.

9. The Administrative Procedure Act applies to Parole Board proceedings.

10. This case has become moot by reason of the fact that the Board has abandoned its warrant and revocation and has reinstated the parole status.

VIII.

ARGUMENT.

A.

Direct Conflict with other Circuits.

We respectfully refer Your Honors to our brief, p. 17, in support of our petition under this head.

Briefly the conflict between Judge Sibley and Judge Lindley is on the following:

Judge Lindley agrees with us that a proper construction of the Parole Statutes requires a valid warrant. Such warrant may be issued only upon information regarded by the Parole member as reliable. A warrant issued arbitrarily is void. The arrested person should be discharged on habeas corpus and the Board is without power to proceed further.

Judge Sibley, on the other hand, believes that after a person is arrested on a parole warrant, it does not matter how custody was obtained. The Board might proceed to a revocation. The prisoners must show that the revocation was a nullity. Their previous showing, and the trial court finding, that the warrant is void, according to Judge Sibley, does not matter. The warrant has become unimportant. Judge Waller has shown the unsoundness of such a conclusion. Judge Sibley goes further to condemn the use of

habeas corpus in matters involving the Parole Board. We submit that the views expressed by Judge Sibley concerning habeas corpus conflict with decisions in about every circuit, to say nothing of the opinions rendered by Your Honors.

It is our contention that the law has been correctly stated by Judges Waller, Underwood, Lindley, Major, Finnegan and Igoe, and that Judges Sibley and Holmes are mistaken. Your Honors have perceived, no doubt, that the conflict concerns important principles of law which should be settled by this Honorable Court. Although Your Honors have in the past announced many fundamental principles controlling here we do not believe that Your Honors have had the precise questions here submitted in the light of recent legislation.

B.

The DeLucia Case.

The Government has undertaken a double barreled attempt to avoid the judgment in the *DeLucia* case. A petition for certiorari is on file in this Honorable Court. Before Judge Igoe there has been filed a motion to vacate. We have appended a copy of the proceedings before Judge Igoe to our brief in opposition to the petition for certiorari in the *DeLucia* case.

On September 6, 1950, Judge Igoe entered the following order:

> "Government's motion for leave to file petition to plead-over is argued and allowed. Petitioner given leave to file answer and cross-claim thereto instanter. Government given until Sept. 13, 1950 to answer or otherwise plead to said answer and cross-claim. Hearing herein is set for Sept. 29, 1950, at 2:00 P.M."

We have appended a copy of the motions filed by the Government before Judge Igoe to dismiss our cross-complaints.

Your Honors will note that in its petition to vacate the judgment, before Judge Igoe, the Government claims that it is not necessary to first apply to the higher courts. We state our intention to apply to the higher courts after the pleadings are settled before Judge Igoe.

The petitioners in the case at bar have asked for affirmative relief on a cross-complaint before Judge Igoe. The Government objects to the inclusion of Compagna and Gioe, in the proceedings before Judge Igoe. At the time of the preparation of this brief there has been no decision by Judge Igoe as to his jurisdiction. The final judgments below in all cases now stand in full force and effect. We undertake to keep this Honorable Court informed concerning these new proceedings.

C.

The Warrants Are Void.

In our brief in support of our petition for certiorari, p. 19, we made an argument under this head. We respectfully refer Your Honors to the well considered opinions written by Judges Underwood, Igoe, Lindley and Waller.

All of the judges, except Judge Sibley and Judge Holmes, agree that a warrant issued arbitrarily is void. It is possible that Judges Sibley and Holmes also agree here, but there is a sharp conflict as to the effect of a void warrant. Judge Sibley has stated that it is unimportant. Judge Underwood and the others are of the opinion that a valid warrant is necessary to give the Board jurisdiction.

D.

The Parole Board Hearing.

May we again refer Your Honors to the brief, p. 47, filed in support of our petition? Your Honors will perceive that Judge Sibley specifically stated that the Appeals Court was aware of the case of *Fleming* v. *Tate*, 156 F. 2nd 848. Judge Sibley said, p. 46:

> "The decision would seem to invalidate on habeas corpus a vast number of parole revocations."

Such a reason for not giving weight to the District of Columbia case seems rather weak. Most revocations are based upon provable facts. A prisoner would gain nothing by a rehearing. The case is rare wherein the Board desires to revoke without evidence. Anyhow we know that Your Honors would not fail to apply the law merely because to do so would result in the invalidation of a vast number of parole revocations.

Since the matter was before Judge Underwood and after the case at bar was decided by Judge Sibley, Your Honors have rendered the opinion in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. Your Honors applied the Administrative Procedure Act to the immigration authorities. Many of the arguments heretofore made in immigration cases against its application were made in parole cases. If Your Honors decide that the Administrative Procedure Act applies to the Parole Board, additional reasons will be found to support Judge Underwood in refusing to pay any attention to the revocation.

Your Honors will perceive from the record (R. 213 to 218) that we have prepared a test case in the matter of the Administrative Procedure Act. Before the warrants were issued we asked to be heard. This was refused while Com-

pagna and Gioe were confined in Atlanta Penitentiary under the warrants. We wrote the Board asking for a hearing with the benefit of counsel, etc. When Compagna and Gioe were brought before two members of the Board they repeated this demand, which was refused. All of this was reported to the trial judge. The hearing afforded by the Board took place before the habeas corpus case came on for trial. Your Honors will note that the Board expressly refused to be bound by the Administrative Procedure Act and it paid no heed to *Fleming* v. *Tate*.

E.

Error of Appeals Court as to the Power of the Board.

In our brief in support of our petition for certiorari, p. 65, we argued at some length to convince Your Honors that there is no foundation in fact for the vague charges in the referrals.

F.

Depositions of Board Members.

We quote from our argument made under this head in our brief, p. 74.

Judge Sibley said:

> "The refusal to answer some interrogatories was due to the belief, we think well grounded, that the court had no part in the Board's deliberations about paroles."

Your Honors will perceive the significance of this holding. Judge Sibley makes no distinction between the granting and revocation of parole. Judge Sibley is of the opinion that habeas corpus is not a proper remedy. Of course,

habeas corpus would be futile if the Board could rightfully refuse to disclose its proceedings.

Of course, Your Honors know that a witness should not be permitted to refuse to answer because of any belief the witness may have concerning the jurisdiction of the Court.

In *Evans* v. *United States*, 10 F. R. D. 255, 257, Judge Dawkins said:

> "It is not the exclusive right of any such agency of the Government to decide for itself the privileged nature of any such documents, but the Court is the one to judge of this when such contention is made. This can be done by presenting to the Judge, without disclosure in the first instance to the other side, whatever is claimed to have that status. The Court then decides whether it is privileged or not."

We submit that Judge Underwood took the correct view. Judge Underwood coupled the refusal on the part of the Board members to answer, with the testimony produced before him, and concluded that the Board had no information of any violation. It followed that the Board was proceeding in an arbitrary manner.

As was said by Judge Major, in *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F2 269, 271:

> "The rule is well established and we think it is of significance in the instant situation that the failure to produce evidence which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it."

When Judge Underwood found that the Board had no evidence and no information of any violation this finding was binding upon the Government. Judge Sibley has found that Judge Underwood committed error in refusing to grant a new trial to the Warden.

We submit that Judge Sibley overlooked this proposition—when the interrogatories were submitted the Govern-

ment Attorneys were before Judge Underwood claiming that the trial judge had no jurisdiction. The witnesses should have answered the questions and left the objections to the lawyers. If a witness appeared before Judge Underwood he could not refuse to answer on the ground that the judge had no jurisdiction. So we submit that Judge Sibley is in error. A well grounded belief on the part of the Board members that the Court had no part in the Board's deliberations would not justify the refusal to answer. The doctrine announced by Judge Sibley would introduce into the practice a novel right which would breed endless trouble for litigants, lawyers and judges.

G.

Right to a Hearing.

Again we respectfully refer Your Honors to our brief, p. 76.

H.

No Error in Denial of Motion for New Trial.

We have argued this point in our brief, p. 79, filed herein in support of our petition for certiorari. Judge Sibley held that Judge Underwood erred in not granting to the Warden a new trial when the Warden appeared at the last moment with revocations.

We failed to play our best card when Judge Underwood was confronted with this last minute motion. Also when Judge Sibley decided as he did, we failed again. *Otis* v. *Securities and Exchange Commission*, 178 F2 983 had not been decided, but we should have thought of the rule, *i.e.*

> An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment.

It is not too late, because the decision of Judge Underwood may now be supported on a rule which was not thought of by us at the time. If Judge Underwood had the rule in mind, the Judge did not mention it in his second opinion. It is possible, of course, that the Judge applied the rule without comment. At any rate, Compagna and Gioe, we submit, are now entitled to the benefit of the rule. The rule is this, the Parole Board having submitted the legal question, as to the validity of the warrant to Judge Underwood, was bound by the result. The Board could not legally return to its quarters, after its defeat in court, and proceed to overrule Judge Underwood. So when it disregarded the decision of Judge Underwood, its revocations were nullities.

We have described the case of *Otis* v. *Securities and Exchange Commission*, 178 F2 34 in our brief prepared for Judge Igoe, p. 93, which brief is appended to our brief in opposition here in the *DeLucia case*.

If Your Honors approve of the rule in the *Otis case* and apply it here, that alone should bring about the reversal of Judge Sibley. The *Otis case* was reversed here without opinion, 338 U.S. 843. Still we submit that the rule is a sound one, if applied to the facts in the case at bar.

Although Your Honors did not write an opinion in reversing the Court of Appeals in the *Otis case*, we believe that we are able to point out reasons for the action taken by Your Honors, reasons which do not apply in the case at bar. The Court of Appeals sought to distinguish the cases, afterwards cited by Your Honors. This Honorable Court relied upon the cases so distinguished, so it must follow that the opinion of the Appeals Court is not sound in its distinguishment. In the case at bar, we do not come within the realm upon which Your Honors and the Appeals

Court differed. In the case at bar the administrative body had completed its work before Judge Underwood was called upon to pass upon its motion for a new trial. Judge Underwood had already decided that a valid warrant was essention to jurisdiction. Right or wrong, that finding was binding upon the Board.

I.

The Law of the Case.

The general rule is stated in *Box* v. *Rundell*, 179 F. 2d 626, 627, 628:

> "The law is settled that a judgment rendered between parties or their privies is conclusive thereafter as to all matters litigated therein and as to every issue, claim or defense which could have been appropriately decided. * * * Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be forever settled as between the parties."

As we have said, Judge Sibley does not say that the result reached in the first opinion is wrong. Most important is the fact that the first opinion stood as the law of the case when the Warden appeared with his revocation and asked for a new trial.

The Warden was a mere messenger, the Parole Board was the real party in interest.

We quote from *Standard Acc. Ins. Co.* v. *Doiron*, 170 F. 2d 206, 209:

> "In American Law Institute Re-statement of Judgments, Sec. 84, the following rule is stated:
>
> " 'A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a propriety or financial in-

terest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.'

"It is explained in the comment that a person is entitled only to one adjudication of a cause of action or of an issue where he has control of the proceedings under the circumstances stated in the rule; and that it is not unfair to such a person that the judgment or the adjudication should determine the existence and the extent of his interests which are dependent upon the determination of issues in the action leading to the judgment."

J.

Parole Board Not a Party.

Again we refer Your Honors to our brief, p. 96.

Judge Igoe found in the *DeLucia case* that the Board was the real party in interest. This finding was approved by Judge Lindley.

We submit that Your Honors should specifically rule upon the law in this regard. It would be unfortunate if prisoners should be met with any such doctrine as that announced by the Appeals Court. A warden shouldn't be permitted to defend his custody in habeas corpus and at the same time plead ignorance of the legal grounds of that custody.

Your Honors will notice that the Government Attorneys, in its new proceedings before Judge Igoe, are pursuing the tactics suggested by Judge Sibley. The Government requests affirmative relief, which we say is on behalf of the Parole Board, but when we seek redress by way of a counterclaim the Government Attorneys claim that Judge Igoe has no jurisdiction over the Board.

K.

Administrative Procedure Act.

Since the decision of this Honorable Court in *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, no further argument may be required as to the applicability of the Administrative Procedure Act. May we respectfully refer Your Honors to the rather lengthy argument made by us in our brief in support of our petition for certiorari in this case, pp. 98 to 130. Of course, if the Administrative Procedure Act applies, the Board, although requested, has done nothing required.

In the *Wong Yang Sung case* Your Honors entered an order 339 U.S. 908, in modification of the judgment. The prisoner was to be held under the warrant. No doubt this order was entered in order that the immigration authorities might have an opportunity to proceed properly under the Administrative Procedure Act. Judge Waller, in *Miller* v. *United States,* 181 F2 363, followed the example set by Your Honors and directed an appropriate order to the end that proceedings might be had under the Act.

In the case at bar if Your Honors agree with Judge Underwood the warrant is void and no further proceedings on the same warrants could be held. However, if further proceedings are directed, may we respectfully make this suggestion—Compagna and Gioe are under the supervision of the Parole authorities. The Administrative Procedure Act directs that the status quo be maintained. Compliance with the Administrative Procedure Act would require that Compagna and Gioe be permitted to stay as they are, on parole, during the further proceedings and until final determination by the Board, and further until the courts have an opportunity to review.

L.

Motion to Dismiss.

May we again refer Your Honors to our brief filed in support of our petition for certiorari in the case at bar, pp. 130 to 137. Also to the brief prepared for Judge Igoe. Your Honors will perceive that in the new proceeding before Judge Igoe we have taken steps to establish, if possible, the status of these parolees. Your Honors will please note the interrogatories propounded by us to the Board members in this regard.

M.

The Order of Remand.

If we are compelled to return to the trial court, pursuant to the remand, permit us to request consideration in this Honorable Court of the remand order.

Judge Sibley has directed that we be given an opportunity to amend and to show if we can that the revocations are nullities. If the case is to go back, we submit that this should be the other way around. The Warden should be required to make sufficient showing to entitle him to a new trial. Of course, if Judge Underwood has stated the law correctly a new trial would do the Warden no good.

May we again respectfully refer Your Honors to our brief in support of our petition for certiorari in this case, pp. 137-140, on the matter of the remand order.

N.

The New York Judgment.

Of course if Your Honors agree with us that Judge Sibley should be reversed and Judge Underwood affirmed; or, if this case is held to be moot, there will be no occasion to consider our attack on the New York judgment. If such an attack ever calls for consideration here, our argument is to be found in our brief in support of our petition for certiorari, pp. 140-145.

Conclusion.

Many cases involving paroles have been cited in the various opinions below. We are quite certain that we have studied every case to be found. Some bad cases have made bad law, prisoners have raised futile points in desperation. In its normal course the Board and the parolees try to work together for proper readjustment. The courts are not called upon and there is no need of defining the limit of power. But here we present exceptional cases. The record shows the proceedings before a Congressional committee. The real battle was for public office, these men became mere pawns in a big game. Such conditions impel those in power to overstep proper bounds. In such cases the courts must stand firm and it is fortunate that our system includes this Honorable Court. An individual judge or public official must give us our rights in the face of possible insinuations made from ulterior motives. Vindication rests largely with Your Honors. We believe that the record bears out our claim that there was never anything wrong or corrupt with the granting of these paroles and that these men have done nothing to forfeit their

rights; that we have never claimed or received anything from the officials or the courts to which the law did not give us title. All we ask, and all we have a right to ask at this bar is equal justice.

We submit that these petitioners have been denied due process of law by reason of the judgment of the Appeals Court and that their discharge on habeas corpus by the trial court should be approved.

Respectfully submitted,

A. Walton Nall,
Wm. Scott Stewart,
Counsel for Appellees.

APPENDIX.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

United States of America ex rel. Paul DeLucia,
Petitioner,
vs.
Thomas P. O'Donovan, United States Marshal,
Respondent.

No. 48 C 867

MOTION TO DISMISS CROSS-COMPLAINT ON BEHALF OF THE RESPONDENT, T. P. O'DONOVAN, UNITED STATES MARSHAL.

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, moves the entry of an order dismissing the cross-complaint for declaratory relief, heretofore filed by leave of court.

The grounds for this motion are as follows:

AS TO THE CROSS-COMPLAINANT DE LUCIA:

1. The United States Board of Parole is not a person subject to the jurisdiction of this court.

2. The respondent does not exercise any discretion or authority with respect to the granting or revocation of parole. Such discretion and authority is vested solely in the Board of Parole. (18 U.S. 4203-4205.) His only duty under the statutes concerning parole is the execution

of warrants for retaking of parole violators. (18 U.S.C. 4206.)

3. The United States Board of Parole has not been nor is a party to the instant proceeding.

4. A cross-claim or cross-complaint may only be pleaded against a co-party (Rule 13(g), Federal Rules of Civil Procedure).

5. The relief sought in the cross-complaint has been formerly adjudicated and adversely determined as to the cross-complainant, DeLucia, in the following case:

Paul DeLucia v. *United States Board of Parole*, No. 48 C 1177.

The cross-complainant, DeLucia, has appealed from this adverse ruling and such appeal is now pending before the United States Court of Appeals for the Seventh Circuit.

6. The cross-complaint fails to state a claim upon which relief can be granted.

AS TO THE CROSS-COMPLAINANTS, COMPAGNA AND GIOE:

1. The cross-complainants, Compagna and Gioe, have not sought leave to intervene in this proceeding and are not proper parties litigant.

2. The cross-complainants, Compagna and Gioe, have never been parties litigant in the instant proceeding.

3. The relief sought in the cross-complaint has been formerly adjudicated and adversely determined as to the cross-complainants, Compagna and Gioe, in the following cases:

Louis Compagna v. *United States Board of Parole*, No. 48 C 1176.

Charles Gioe v. *United States Board of Parole*, No. 48 C 1178.

The cross-complainants, Compagna and Gioe have appealed from these adverse rulings and such appeals are now pend-

ing before the United States Court of Appeals for the Seventh Circuit.

4. The cross-complaint fails to state a claim upon which relief can be granted.

OTTO KERNER, JR.,
United States Attorney.

MOTION TO DISMISS CROSS-COMPLAINT ON BEHALF OF THE UNITED STATES BOARD OF PAROLE APPEARING HEREIN SPECIALLY.

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, moves the entry of an order dismissing the cross-complaint for declaratory relief as to the United States Board of Parole.

The grounds for this motion are as follows:

1. The United States Board of Parole is not a judicial person and has no legal existence. It is at best a non-suable agency of the Executive Branch of the United States.

2. The United States Board of Parole is comprised of five members. (18 U.S.C. 4201.) Any asserted cause of action concerning the granting or revocation of parole necessarily involves the members of the Board of Parole. Such an action must be brought against the members of the Board of Parole at the seat of government, Washington, District of Columbia, the official residence of the members of the United States Board of Parole.

3. Alternatively, the United States Board of Parole has never appeared in these proceedings as a party litigant; nor has it been joined as a party litigant in this proceeding; nor has any attempt been made to join the United States Board of Parole as a party litigant to these proceedings, by amendment, by motion, by the issuance of process or otherwise.

OTTO KERNER, JR.,
United States Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 5

LOUIS COMPAGNA AND CHARLES GIOE, PETITIONERS

v.

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 242–250) and its opinion and order denying motions for reconsideration of its judgments (R. 253–254) are reported at 82 F. Supp. 295. The majority (R. 269–277) and dissenting (R. 277–278) opinions in the Court of Appeals and that court's *per curiam* opinion and order denying a petition for rehearing (R. 285) are reported at 178 F. 2d 42.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1949 (R. 279) and a

petition for rehearing (R. 281–283) was denied on December 16, 1949 (R. 285). The petition for a writ of certiorari was filed on January 12, 1950, and was granted on May 15, 1950 (R. 287). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a prisoner held under a judgment of conviction, following his arrest as a parole violator and the revocation of his parole, is required to show, as a condition of his discharge on habeas corpus, that the revocation of parole is null and void, or whether it is sufficient that the court find that the warrant under which he was arrested as a parole violator was issued by the Board of Parole without information of parole violation.

2. Whether a parolee who is retaken under a parole-violation warrant is entitled to a formal hearing before the Board of Parole, including the right to counsel, to produce witnesses, and to cross-examine opposing witnesses, before his parole may be validly revoked.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 93–107.

STATEMENT

Petitioners Louis Compagna and Charles Gioe are two of a group of defendants who were convicted in 1943, in the District Court for the

Southern District of New York, of violating the Federal Anti-Racketeering Act of 1934 (18 U. S. C. [1940 ed.] 420a) by conspiring to extort upwards of $1,000,000 from the motion picture industry (R. 39, 43–46).[1] Each was sentenced to ten years' imprisonment and to pay a fine of $10,000 (R. 39). Their convictions were affirmed by the Court of Appeals for the Second Circuit, and this Court denied certiorari (R. 29; see *United States* v. *Compagna,* 146 F. 2d 524, certiorari denied, 324 U. S. 867).

1. On August 13, 1947, having served in excess of one-third of their prison sentences (see 18 U. S. C. [1946 ed.] 714, Appendix, *infra,* pp. 93–94), petitioners were released from Leavenworth Penitentiary on parole (R. 28, 38, 42). The paroling of petitioners (and of two of their convicted co-defendants, including Paul De Lucia, the respondent in No. 163, this Term, see fn. 1, in the margin) was followed by unfavorable newspaper publicity in Chicago, and a subcommittee of the House Committee on Expenditures in the Executive Departments was appointed to investigate the operations of the United States Board of Parole, particularly in so far as they affected these parolees'

[1] Paul De Lucia, the respondent in No. 163, this Term, pending on petition for a writ of certiorari, was also a defendant in this prosecution (R. 43). One of the issues presented in the case at bar—the first "Question Presented," *supra*—is closely related to, though not identical with, the issue presented in the *De Lucia case.* See pp. 13–16 of our petition for certiorari in that case; see also pp. 37–49, *infra.*

cases.[2] Extensive hearings were held by this subcommittee in Chicago and Washington beginning in September 1947 and continuing to June 1948.[3] The printed transcript of the hearings held up to March 11, 1948, was received in evidence in the habeas corpus proceedings here involved (see R. 152, 163–164, 260) and is on file as an original exhibit in this Court. The transcript of these hearings indicates that members Rogers and Monkiewicz of the Board of Parole testified before the subcommittee that the Board was unaware of any instances of parole violation by petitioners up to the dates of their testifying.[4]

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[2] See *Seventeenth Intermediate Report of the Committee on Expenditures in the Executive Departments*, entitled "Investigation as to the Manner in which the United States Board of Parole is Operating, &c.," dated June 19, 1948 (H. Rep. No. 2441, 80th Cong., 2d sess.), p. 1. This report was attached to and made a part of the petitions for writs of habeas corpus which gave rise to the instant proceedings (see R. 2, 3, 25). Portions of the report are quoted in the petitions (see R. 3, 4, 5, 6, 25), but the report is not reprinted in its entirety in the record.

[3] The subcommittee sat on September 25 and 26, 1947, February 16, 17, 18, March 1, 2, 3, 4, 9, 11, and June 7, 1948 (see title page and p. 2 of the *Seventeenth Intermediate Report*, &c., cited in fn. 2, *supra*.

[4] Board member Fred S. Rogers, testifying on March 3, 1948, stated (Hearings, p. 573): "These men [petitioners and two of their convicted codefendants who had also been granted paroles, including De Lucia, the respondent in No. 163, this Term] have been out for 6 months, and there has not been a single report of an infraction of a rule of society against them. * * * We have the FBI that has watched

2. On July 21, 1948, pursuant to 18 U. S. C. [1946 ed.] 717 and 723c (Appendix, *infra*, pp. 95–97, 98–99), Board member Rogers issued warrants for the arrest of petitioners as parole violators (R. 41 [Compagna]; Gioe's omitted, see R. 37), each warrant reciting that "reliable information" had been presented to the signer of the warrant that the parolee had "violated the conditions of his parole."[8] The specific respects in which each petitioner had allegedly violated the terms of his parole were set forth in a document entitled "Referral for Consideration of Alleged Violation," bearing the same date as the warrant and ad-

---

them; we have the Chicago police that have watched them; and not one report [of parole violation] has been received by the Board of Parole."

Board member Boleslau J. Monkiewicz, testifying on March 9, 1948, gave like testimony (*id.*, p. 713).

[8] A like warrant had previously been issued, on June 15, 1948, for the arrest of Paul De Lucia as a parole violator, and De Lucia was taken into custody on the following day, June 16, 1948 (see pp. 8–9 of our petition for certiorari in No. 163, this Term). The *Seventeenth Intermediate Report of the Committee on Expenditures in the Executive Departments* (see fn. 2, *supra*, p. 4), dated June 19, 1948, contains the following statement (p. 2; see R. 3):

"The hearings do indicate that the granting of the paroles was improvident, in part due to negligence, and should long ago have been revoked. At the last hearing held in Washington on June 7, 1948, the members of the United States Parole Board, one recently appointed [Chairman George G. Killinger], assured the committee that definite action on the committee's request that the paroles be revoked would be taken, not later than the 19th day of June, 1948."

dressed to the Board of Parole (R. 38, 42).[4] Petitioners were taken into custody pursuant to the warrants and were committed to Atlanta Penitentiary on July 24, 1948 (R. 23, 36, 37).

On July 26, 1948, counsel for petitioners addressed identical letters to the Board of Parole, one on behalf of Compagna and the other on behalf of Gioe (see R. 215, 222), requesting that petitioners be accorded formal hearings on the charges of parole violation (R. 214–215, 220–221). It was requested that each petitioner be given the "benefit of counsel at all stages of the proceeding, including those preliminary to the hearing"; a "specification of the charges or outline of the evidence upon which the warrant was issued * * *. This to be furnished in advance of the hearing in order to give the parolee an

[4] Compagna's "referral" listed the following charges against him (R. 42):

"1. Failure to reveal source of monies used in Settlement of Internal Revenue tax, when questioned before a legally constituted body.

"2. Failure to conduct himself honorably.

"3. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth."

Gioe's "referral" charged him with (R. 38):

"1. Change of employment without permission.

"2. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

"3. Association with persons of bad reputation.

"4. Failure to conduct himself honorably.

"5. Failure to give a proper accounting of income and expenditures."

opportunity to prepare"; advance notice "of the time and place of the intended hearing in order that [each petitioner] may have present his witnesses"; the "privilege of confronting any witnesses who claim to know of any violation and to hear their testimony and to cross examine"; the "opportunity and permission to produce witnesses"; [p]ermission to have counsel present at all stages of the hearing and to have the benefit of representation by counsel"; "[p]ermission to have present at all stages of the hearing a court reporter to be selected and paid by [each petitioner], or that the Board require the presence of a court reporter and furnish [each petitioner], at his expense, with a transcript"; and "[n]otification of the action of the Board together with a copy of any findings made or orders entered." (R. 214–215, 220–221.) In addition, it was requested on behalf of each petitioner that he be notified whether there was "to be any attempt to revoke the parole on the ground that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole" (R. 214, 220).

On August 6, 1948, the Chairman of the Board of Parole, George G. Killinger, replied to the above letters as follows (R. 216, 222–223):

* * * * *

> We shall be glad to confer with you as counsel for these prisoners at our office in Washington or consider any pertinent in-

formation you may wish to submit in their behalf. It has never been the policy, however, to admit counsel to the deliberations of the Board either at the time it interviews the prisoner in connection with his application for parole or at the time he appears before the Board to make his statement in connection with its revocation or modification. See Rule 4 (d), page 3, of our Rules and Regulations promulgated in 1936. Federal Boards of Parole have uniformly assumed, in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board as to whether the welfare of society would be promoted by the granting, revocation or modification of parole.

Parole is not a legal right vested in a prisoner. It is merely the granting of permission, as an administrative act by an executive agency, to a prisoner to serve a portion of his sentence outside the prison walls. The parolee continues, both actually and legally, to be in custody. He is, however, allowed to remain in the community within limits fixed by the Board but under conditions that permit of reincarceration in the event of misbehavior, or in the event the Board believes continuance of the prisoner on parole is no longer compatible with the welfare of society.

> To sum up, it is our position that a formal hearing of the kind you seek is not provided for by the statute. We shall, however, be glad to have you submit in writing, or in person at our headquarters, any material or information bearing on these cases.

With respect to the request that petitioners be advised whether the Board was contemplating revocation of the paroles on the ground that they had been "improperly granted or upon facts and circumstances existing at the time of the granting of parole" (*supra*, p. 7), Mr. Killinger replied (R. 216, 222):

> * * * Upon that point you have our assurance that any action we may take looking to revocation of parole, will be based upon events occurring subsequent to release on parole.

3. On September 2, 1948, the present proceedings were instituted by the filing of petitions for writs of habeas corpus on petitioners' behalf in the District Court for the Northern District of Georgia (R. 1–21, 23–27).[1] The legality of petitioners' detention was challenged on the ground that the warrants for their arrest as parole violators had been issued, it was alleged, without "reliable information" of violation (see

[1] Gioe's petition (R. 23–27) was less detailed than Compagna's lengthier petition (R. 1–21), but it in effect incorporated the latter by reference insofar as it was "applicable to [his] case" (R. 27).

18 U. S. C. [1946 ed.] 717, Appendix, *infra*, pp. 95–97), "arbitrarily and capriciously, without any justification in law or fact" (R. 5), and solely in consequence of political pressure brought to bear on the Board to revoke the paroles (see, generally, R. 1–9, 23–27).* Attached to the petitions (see R. 2) were copies of the Report of the Committee on Expenditures in Executive Departments (see fn. 2, *supra*, p. 4) and the transcript of the hearings before the subcommittee of this Committee which investigated the operations of the Board

* A second and independent basis for the petitions was the charge that the original convictions in the Southern District of New York were void because the Government, allegedly, knowingly used perjured testimony against petitioners at their trial, and because the trial court was without jurisdiction of the criminal proceedings for the alleged reason that the conspiracy charged was not formed in New York (see R. 9–15, 27). As pointed out by the Government, however, in its amended response to the District Court's order to show cause why writs of habeas corpus should not issue (R. 46; see also R. 160), and by the Court of Appeals in its opinion (R. 272), any question as to the validity of the original judgments of conviction is required, under 28 U. S. C. 2255, to be raised in the court of conviction by a motion to vacate, and may no longer be collaterally litigated in a habeas corpus proceeding, unless it "appears that the remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] detention." Petitioners have made no showing and do not claim that the remedy provided by 28 U. S. C. 2255, which took effect on September 1, 1948, prior to the commencement of these habeas corpus proceedings, is inadequate or ineffective as a vehicle for challenging the validity of their convictions. Consequently, the decision of the courts below not to inquire into the validity of the convictions in the habeas corpus proceedings is clearly correct, and we shall make no further reference to this issue herein.

of Parole (see pp. 3–4, *supra*), both of which, it was stated, tended to substantiate the charges of the petitions (see R. 2–8, 25–26).

Each petition further stated (R. 20, 26) that—

> The Parole Board has set September 8, 1948, as a tentative date for a hearing in prison and on this September 2, 1948, for the first time has notified your petitioner of the nature of the charges to be made as a basis for revocation [of parole] as follows:

This was followed by a list of the specific charges of parole violation, as contained in the "referral" applicable to each (see fn. 6, *supra*, p. 6), and by general denials of the truth of such charges (R. 20–21, 26–27).

Among the prayers for relief made by each petitioner was the request (R. 18–19; see also R. 27) that "the Parole Board be ordered to grant your petitioner a hearing in accordance with the requirements of the Administrative Procedure Act [of June 11, 1946 (5 U. S. C. 1001–1011); see Appendix, *infra*, pp. 99–107, for pertinent provisions of this Act]." Specifically, it was requested that the court direct the Board of Parole to accord each petitioner a formal hearing, with all the incidents of such a hearing—representation by counsel, the right to produce witnesses on his own behalf, the right to cross-examine opposing witnesses, etc.—as had previously been requested of the Board in peti-

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tioners' counsel's letter of July 26, 1948, *supra*, pp. 6–7.

On September 20, 1948, pursuant to orders to show cause why the prayed-for writs should not issue (R. 28; see R. 37), respondent filed responses (R. 28–36; see R. 37) justifying his detention of petitioners on the basis of the original conviction and sentence of each (R. 28–29), and the issuance of the parole-violation warrants and the "referrals" listing the specifications of such violations (R. 28–29).[9] The responses further stated that on September 8, 1948, petitioners had been given hearings in the penitentiary before two of the three members of the Board of Parole; that the Board then had under consideration the question of whether or not petitioners had violated the conditions of their paroles; that in due course the Board would, on the basis of their findings, issue orders either revoking or reinstating the paroles; but that no such decisions had as yet been made (R. 31; see R. 37). Accordingly, each response averred (R. 31; see also R. 35)—

> Petitioner has not even exhausted his administrative remedy, and this habeas corpus proceeding is premature by reason of the fact that the United States Board

[9] Copies of the original conviction, sentence, commitment, etc., of each petitioner (R. 36–37, 39–40, 42–46), and the parole-violation warrant (R. 41 [Compagna]; Gioe's omitted, see R. 37) and "referral" applicable to each (R. 38, 42) were attached to the respective responses as exhibits.

> of Parole has not taken final administrative action in its discretionary power as provided by the Acts of Congress to actually render final decision as to whether the parole should be revoked or modified * * * [citing 18 U. S. C. [1946 ed.] 719, Appendix, *infra,* pp. 97–98].

The responses, in addition, denied the applicability of the Administrative Procedure Act to any phase of the activities of the Board of Parole (R. 31–36, 47; see R. 37).

On September 27, 1948, each petitioner (see R. 23) filed an amendment of his petition (R. 22–23) alleging that the hearing accorded him on September 8th by two members (Killinger and Monkiewicz) of the Board of Parole was not such a hearing as is contemplated by the Administrative Procedure Act. Specifically, the amendment alleged (R. 22)—

> * * * Your petitioner was cross-examined concerning the charges herein referred to [*i. e.,* in the original petition, in which the charges of parole violation, as contained in each petitioner's "referral," were quoted and denied; see p. 11, *supra,* and fn. 6, *supra,* p. 6] and your petitioner repeated denial to said charges. A court reporter took notes. Your petitioner maintained and stated to the members of the Board that no violation of parole had occurred. The matter was continued generally and referred to Washington. No evidence other than that of your

> petitioner was introduced. Although specifically requested of the members of the Board on September 8, 1948, your petitioner was denied the right of counsel and all other necessary incidents of a proper hearing.[10]

In a traverse to the response to the show-cause order (R. 47–49), filed at about the same time as the above-described amendment of his petition, each petitioner alleged (R. 48):

> 79. * * * Respondent has failed to meet the real issue and appears to take the position that * * * the [parole-violation] warrant [is] good, regardless of the facts. We find no denial * * * in the Response that the warrant was arbitrarily issued in the absence of evidence.
>
> * * * * *
>
> 82. The Response alleges that final Administrative action has not been taken. Petitioner states the fact to be that the so-called warrant is a commitment and as such is final.

4. On September 27, 1948, following a hearing on the foregoing pleadings (R. 50–87), writs of habeas corpus were granted, returnable on October 25, 1948 (R. 49). On the latter date, a hearing

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[10] When petitioners appeared before members Killinger and Monkiewicz of the Board of Parole in the penitentiary on September 8, 1948, each petitioner read to the Board members a copy of the letter of July 26, 1948, *supra*, pp. 6–7, written by their counsel to the Board, in which formal hearings for petitioners were requested (R. 217, 223).

on the writs was held (R. 93–207) at which both petitioners testified (R. 94–117, 117–136).

At the commencement of the October 25th hearing (see R. 93–94), respondent filed an amendment of each of his responses to the show-cause orders (R. 46–47), stating that he was (R. 46)—

> * * * without personal knowledge whether the warrant issued by the United States Board of Parole * * * was issued capriciously and without reliable information, as alleged by the petitioner, but that the recitation in the warrant that it was issued upon reliable information creates a presumption of regularity and legality.

The October 25th hearing then proceeded with the giving of testimony by petitioners (R. 94–117, 117–136). Each petitioner was permitted to testify, over the repeated objections of the Government (R. 98, 102, 105, 115–116, 121, 130) that the charges of parole violation, as contained in the referrals (see fn. 6, *supra*, p. 6), were not true (Gioe: R. 98–106; Compagna: R. 120–129).[11] Pe-

[11] One of the charges of parole violation made against petitioner Compagna was "Failure to reveal source of monies used in Settlement of Internal Revenue tax, when questioned before a legally constituted body" (see fn. 6, *supra*, p. 6). On February 17, 1948, Compagna testified before the subcommittee of the House Committee on Expenditures in the Executive Departments that was investigating the operations of the Board of Parole (see pp. 3–4, *supra*) that while he was in prison his then attorney, Eugene Bernstein, on his behalf, paid the United States Government some $89,000 in settlement of certain income tax claims against him; that various "friends" of his (Compagna's) furnished the money; but that he did not know who these "friends" were (Hearings [see p. 4,

titioners also testified over objection that the hearings accorded them by the Board of Parole in the penitentiary consisted merely of their being questioned by the two Board members present relative to the charges contained in the referrals, and that they (petitioners) asked for and were refused permission to be represented by counsel at the hearings, to produce witnesses in their behalf, and to be accorded the other benefits of a formal hearing enumerated in their counsel's letter to the Board of Parole of July 26, 1948, *supra*, pp. 6–7 (R. 100–101, 107, 119–120). The Government moved to strike all such testimony (R. 115), and the motion was denied (R. 115–117). The objections to both these lines of testimony were based on the asserted ground that it was the exclusive function of the Board of Parole to determine whether violations of parole had occurred, and that, pending decision by the Board

supra], pp. 279–282). Bernstein had previously testified before the subcommittee that he himself never knew the identities of these persons who had furnished the tax-settlement money; he explained that the money was supplied by "[e]ight or nine different persons," who either mailed him the money or brought it to him in person, saying "Pay this for Louis [Compagna]" (Hearings, pp. 72–73). At the habeas corpus hearing, Compagna insisted, both on direct (R. 125) and on cross-examination (R. 130–135), that he had testified truthfully before the subcommittee; that he still did not know the identities of his benefactors (R. 127, 133–134); and that he had made no efforts to determine who they were (R. 127, 132).

See also Gioe's testimony as to his connection with one Phil Macy (R. 104–108) and compare charge 3 in the referral, quoted *supra*, fn. 6, p. 6.

as to whether there had been violations and whether the paroles should be revoked, petitioners' assertions in habeas corpus proceedings that they had not violated their paroles and had not received fair hearings by the Board were irrelevant because premature (see, especially, R. 115–116).

Also received in evidence on petitioners' behalf at the October 25th hearing (R. 152, 211) was a deposition by Board member Monkiewicz in the form of answers (R. 218–225) to certain written interrogatories (R. 231–233).[12] The more relevant of the interrogatories, and the corresponding answers, were as follows:

> 52. Is the testimony given by you correctly reported in the printed copy of the volume entitled, "Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives Eightieth Congress Second Session"? Would you make the same answers here if the same questions were here put to you? [R. 231.]
>
> [A.] The answer to the first part of the question is "Yes."[13]

[12] The same interrogatories were propounded to Board Chairman Killinger (R. 229–231), and identical answers were made (R. 212–218). Interrogatories identical with those propounded to Messrs. Monkiewicz and Killinger were proposed to be put to the third member of the Board, Mr. Rogers (see R. 227–229), but, owing to the latter's absence from Washington at the time the other members of the Board made their answers, they were not answered (R. 211–212).

[13] For the asserted relevance of this reply, see p. 4, *supra*, and fn. 4.

I decline to answer the second part of the question since it involves a matter now pending before the Board of Parole. [R. 219.]

53. In the warrant signed by Judge Rogers, Judge Rogers recites that reliable information has been presented to him of a violation. Will you please state what the information was as to each case? When it reached you? Its source, and your reasons, if any, for believing it to be reliable? [R. 231.]

[A.] Answers to the three questions here involved is [*sic*] declined because they relate to a matter now pending before the Board of Parole. [R. 219.]

* * * * *

55. Has the Parole Board caused the publication of information, rules, opinions, orders and public records as required by sec. 1002, Title 5, United States Code? [R. 231.]

[A.] I have been advised that Section 1002, Title 5, United States Code, which is part of what is commonly referred to as the "Administrative Procedure Act," is inapplicable to the U. S. Board of Parole. [R. 219.]

* * * * *

57. In these cases, has the Parole Board made any effort to comply with sec. 1004, Title 5, United States Code [§ 5 of the Administrative Procedure Act, Appendix, *infra*, p. 101]? [R. 231.]

[A.] The answer is the same as that in question No. 55. [R. 219.]

* * * * *

60. Is it a fact that these parolees have requested, and the Parole Board has denied, the right to be accompanied, represented and advised by counsel in the matter of hearings before the Parole Board on the question as to whether or not there has been a violation of parole? [R. 232.]

[A.] By letter of July 26, 1948, counsel for the parolees requested "the benefit of counsel at all stages of the proceedings including these [*sic*] preliminary to the hearing." The attitude of the Board of Parole upon that request is reflected in a letter sent by the Board to William Scott Stewart, dated August 6, 1948. Copies of this correspondence are incorporated herein and made part of this reply. [R. 220.] (N. B. The letters referred to were then set forth *verbatim* (R. 220–223). See pp. 6–9, *supra,* where the substance of these letters is set forth.)

61. Has the Parole Board made any effort to comply with sec. 1006, Chapter [*sic*] 5, United States Code as to Hearings [§ 7 of the Administrative Procedure Act, Appendix, *infra,* pp. 102–104]? [R. 232.]

[A.] The answer is the same as in question No. 55 [R. 223].

62. Is it not true that a so-called hearing, as to the cases of Compagna and Gioe, was held in the Penitentiary at Atlanta by two members of the Parole Board, George Kil-

linger and B. J. Monkeiwicz [*sic*], in which hearing the parolees were denied the right of counsel, and the usual requirements as to due process, and that no effort was made to comply with the Administrative Procedure Act? [R. 232.]

[A.] Compagna and Gioe were given an opportunity to appear before Board members Killinger and Monkiewicz at Atlanta Penitentiary on September 8, 1948. At such appearance both Compagna and Gioe read to the Board members a copy of the letter written by Mr. Stewart to the Board of Parole on July 26, 1948 [see pp. 6–7, *supra*], copy of which is made part of my reply to Question No. 60. Gioe read the said letter at the start of his appearance and thereafter answered all questions without objection. Compagna answered all questions without objection and at the conclusion of his appearance read the said letter of July 26, 1948. Section 719, Title 18, United States Code [see Appendix, *infra*, pp. 97–98], now Section 4207, same Title, which is the authority under which the Board acts in such matters, contains no provision for representation by counsel. I am unable to state, therefore, that these parolees were denied the usual requirements as to due process. As stated in the answer to question No. 55, the Administrative Procedure Act is believed to be inapplicable to the Board of Parole. [R. 223–224.]

* * * * *

64. Have the members of the Parole Board who conducted the hearing of September 8, 1948, in Atlanta, made a decision and if so what is that decision? [R. 232.]

[A.] No decision has been reached [R. 224].

65. * * * If no finding has been made please state when we may expect a finding and reasons for delay [R. 232].

[A.] * * * No definite date can be stated at this time when a finding will be made. However, there has been and will be no unnecessary delay in making a finding in these cases. All appearances of prisoners before the Board of Parole are stenographically reported and such appearance[s] run well into the hundreds at every meeting held by the Board. The stenographic notes are returned to the Board's offices in Washington and transcribed by the reporter upon his return to Washington following successive meetings at three or four different penal institutions. Thereafter each case receives separate consideration by the Board members, one-third of whose time is consumed in holding parole meetings in the field and travel incidental thereto. This information is given in order that the court may appreciate that an elapsed period of even several months between appearance and decision in such matters cannot be considered either unusual or unreasonable. [R. 224.]

66. Is it not true that these parolees have requested a transcript of the hearing of

September 8, 1948, and have offered to pay for the same, and that the Parole Board has refused to furnish same? [R. 232.]

[A.] Yes. In explanation I will add that there is neither a statutory nor customary provision for furnishing such transcripts to parolees [R. 224.]

67. Give a summary of the evidence upon which it is claimed that there has been a violation of parole? [R. 232.]

[A.] I decline to answer because it involves a matter now pending before the Board of Parole. [R. 224.]

* * * * *

Following the presentation of the above-summarized evidence on petitioners' behalf, and the election of the Government to present no rebuttal evidence, argument of counsel was heard on the question of whether, under the pleadings and proof thus far adduced, petitioners were entitled to be discharged (R. 161–207). Counsel for petitioners contended that it had been established by the pleadings and evidence that the Board of Parole had arbitrarily issued the warrants of parole violation without evidence or information of violation, and that consequently the warrants were void and petitioners' detention illegal (R. 163, 167, 170–171, 174, 176, 177, 179, 205). Government counsel renewed and amplified the Government's argument, previously made in its responses to the show-cause orders (*supra*, pp. 12–13), that the habeas corpus proceedings were pre-

mature (and the court, accordingly, without jurisdiction) because the orderly administrative process for the revocation of parole, provided for by statute, had not yet been completed, and would not be completed until the Board, having issued warrants and granted petitioners the appearances required by statute, took final action by revoking the paroles (if and when it determined that the charges of violation had been substantiated) (R. 187–194, 199–201). (See *United States ex rel. Jacobs* v. *Barc,* 141 F. 2d 480, 483 (C. A. 6).) In reply to the court's query as to what evidence or information, if any, the Board had to support the charges of parole violation contained in the warrants and accompanying referrals (R. 200, 201), counsel for the Government insisted that inquiry into this matter was premature for the above-stated reasons and announced their intention of "stand[ing] on the proposition of law" (R. 201).

5. On December 4, 1948, the District Court (Underwood, D. J.) made "findings of fact and conclusions of law" (R. 242–250) and entered orders (R. 250–251) sustaining the writs and directing petitioners' discharge from custody. The court held that under 18 U. S. C. [1946 ed.] 717 (Appendix, *infra,* pp. 95–97), an "express condition precedent to the issuance of a Parole Violator Warrant is that the issuing authority 'have reliable information that the prisoner has violated his parole.' This is in the nature of a jurisdictional requirement and may be inquired into by compe-

tent authority" (R. 244); and that, while "[t]here is a presumption of the legality of the warrant, * * * it is not a conclusive presumption and it has been overcome by the evidence in the case" (R. 245). Judge Underwood made it clear that he did not conceive it his function to inquire into the reliability of any information on which the Board of Parole may have acted in issuing the warrants, but merely to determine whether the Board acted on any "substantial information," reliable or otherwise (R. 244; see also R. 203, 206).[14]

The orders directing petitioners' discharge specified that they should not take effect until 15 days from the date of entry, the purpose of the delay being "to afford opportunity for appeal if desired, or in order to enable the United States Board of Parole to issue * * * new parole Violator Warrant[s], provided said Board, or a member thereof, has, or shall become possessed of, reliable information of parole violation during such period of delay" (R. 250–251).

6. On December 17, 1948, within this 15-day

[14] Judge Underwood held that petitioner's contentions that their original convictions were void were "without merit" (R. 243), and found it "not necessary to consider the other grounds of the petitions for writ[s] of habeas corpus" (R. 250). See, however, his subsequent opinion and order denying respondent's motions to reconsider, wherein he held, as a partial basis for denying the motions, that the hearings accorded petitioners by the Board of Parole had not been fair (*infra*, pp. 25–27).

period, respondent filed in the District Court "motion[s] to reconsider" its judgments (R. 251–252) on the ground that on the preceding day, December 16th, the Board of Parole had "taken action by revoking the parole[s]" of petitioners, with the consequence that he, respondent, "now holds the said [petitioners] in custody upon the basis of the official revocation of parole[s], * * * to complete service of the sentence[s] originally imposed as required by law" (R. 251). Copies of the "certificate[s] of revocation" were attached to the motions as exhibits (R. 252 [Compagna]; Gioe's omitted).

Pursuant to an order to show cause why the motions to reconsider should not be granted (R. 253), a hearing was set for December 20, 1948. On the latter date, "[c]ounsel advised the Court that they did not desire to present further evidence or argument" (R. 253), and the motions were denied (R. 254). In a short opinion accompanying the order of denial, Judge Underwood said (R. 253–254):

> On December 4, 1948, judgments in the habeas corpus proceedings were entered discharging petitioners from custody. The judgments were final, but execution of them was stayed for fifteen (15) days for two purposes only—to allow time for appeal or for issuance by the Parole Board of valid Parole Violator Warrants. Neither action was taken.

These motions request reconsideration of the judgments for the sole reason that the Parole Board has now revoked the paroles, such action having been taken on December 16, 1948.

On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the members of the Board declined to even state what violations of the parole were charged [15] and indicated that no hearings would be granted petitioner[s] other than the "appearances" they had had before the Board. These "appearances" fall far short of the fair hearing which the law contemplates.

If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met with anything but silence similar to that encountered at

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[15] Judge Uunderwood's statement that "the members of the Board declined to even state what violations of the parole were charged" is inaccurate and misleading, as pointed out by the Court of Appeals (R. 274). The "referrals," issued simultaneously with the warrants, listed the specific respects in which petitioners were charged with having violated their paroles (see pp. 5–6, *supra*, and fn. 6), and petitioners were well aware of the nature of the alleged violations at least as early as September 2, 1948, when they filed their petitions for habeas corpus (see p. 11, *supra;* R. 281, 285). It seems evident that what Judge Underwood meant was that the members of the Board declined to state on what information the charges were based (see R. 201, 206).

the hearings already had and nothing would be gained.

The revocations of parole were based on illegal Parole Violator Warrants and were issued without fair hearings and in my opinion are invalid.

7. On appeal by respondent to the Court of Appeals for the Fifth Circuit, the orders sustaining the writs and directing petitioners' discharge were reversed (R. 269–277, 279), one judge dissenting (R. 277–278). The majority found it unnecessary to determine whether the District Court was right when, on December 4, 1948, prior to the taking of final action by the Board of Parole on December 16th revoking the paroles, it ordered petitioners' discharge pursuant to its holding that parolees in custody under violation warrants can successfully challenge on habeas corpus the validity of their detention on showings that the warrants were issued without information of violations. For the majority, the decisive feature of the case was the Board's taking of that final action of parole-revocation prior to the effective date of the District Court's orders of discharge. Upon revocation of the paroles, the parolees were no longer held merely under the warrants alleging parole-violation, but, by virtue of the certificates of revocation, under the original commitments themselves (see R. 251, 252). Consequently, the majority thought, after the paroles were revoked, the question of the legality

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of the parolees' prior detention under the warrants became, in effect, moot. Upon revocation of parole, as the majority put it, "[t]he warrant has become unimportant" (R. 275).

Accordingly, in the opinion of the majority, upon the revocation by the Board of Parole of petitioners' paroles prior to the effective date of the orders of discharge, and the filing by respondent of motions, based on the intervening revocations, to reconsider the orders of discharge, the District Court erred in summarily denying the motions to reconsider. "If a revocation of a parole can ever be attacked collaterally by habeas corpus against the Warden," the majority said (R. 276), "it ought to be nullified only on plain evidence and a full hearing." The order of reversal and remand, therefore, directed that petitioners be remanded to respondent's custody "with leave to [petitioners], if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held" (R. 276–277, 279).

The majority also held that the "appearances" accorded petitioners in the penitentiary by the Board of Parole, pursuant to 18 U. S. C. [1946 ed.] 719 (Appendix, *infra*, pp. 97–98), had not been unfair (as the District Court had thought, see pp. 26–27, *supra*), but, on the contrary, had been in

accordance with law."[16] "The requirements as to procedure in the Administrative Procedure Act," the majority decided, "have no application to the Parole Board" (R. 275; see also R. 272–273).[17] And, with particular respect to petitioners' contention that they had been unlawfully deprived of the assistance of counsel at their appearances

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[16] The dissenting judge expressed no views on this aspect of the case (see R. 277–278).

[17] In reaching the conclusion that the Administrative Procedure Act does not apply to the Board of Parole, the majority said (R. 272–273):

"* * * It [the Administrative Procedure Act] has never been thought applicable by the Board or the Attorney General who appoints its members and approves its rules. The full dress procedure it requires would render it practically impossible for the Board to handle its business. * * * [Parole] is a legislative grace and not a thing of right. The legislature may affix such conditions and provide such administration as it will. Courts have no function, except as the statutes give them power. As respects parole, the original statutes [18 U. S. C. (1946 ed.) 714 *et seq.*, Appendix, *infra*, pp. 93–99], as well as the revision now of force [18 U. S. C. (1948 rev.) 4201–4207], bristle with discretion given the Board, and are silent about court interference. * * * It is very evident that the whole matter of paroles is left to the informed discretion of the Board. Court action is not made a part of it. The Administrative Procedure Act, in authorizing court review of the acts of the agencies which it governs, as to them excludes such action when '(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.' 5 U. S. C. A. Sec. 1009 [§ 10 of Act, Appendix, *infra*, pp. 105–107]. Certainly no review of what the Board is doing or has done can be undertaken by habeas corpus where the Board is not a party * * *." (But see § 10 (b), 5 U. S. C. 1009 (b), Appendix, *infra*, pp. 105–107, which mentions habeas corpus as one of the forms of judicial review of agency action.)

before the Board, the majority said (R. 275–276)—

> * * * The Chairman [of the Board of Parole] by letter offered to let counsel come before the full Board in Washington and present any material or information bearing on the cases, though he declined to have a full scale trial. [See pp. 7–9, *supra*.] This was not unfair. * * * We are aware that in *Fleming* v. *Tate*, 156 F. 2d 848 [(C. A. D. C.)], it was held that the statute, then 18 U. S. C. A. Sec. 719,"

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[18] Actually, the statute construed in *Fleming* v. *Tate* was § 24–206 of the District of Columbia Code (1940 ed.), which provided in pertinent part when *Fleming* v. *Tate* was decided (in 1946): "At the next meeting of the [District of Columbia] Board of Indeterminate Sentence and Parole held after the issuing of a warrant for the retaking of any paroled prisoner, said board shall be notified thereof, and if such prisoner shall have been returned to the institution, he shall be given an opportunity to appear before said Board of Indeterminate Sentence and Parole, and the said board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof * * *." However, a comparison between the quoted language of the District of Columbia statute and 18 U. S. C. [1946 ed.] 719 (see Appendix, *infra*, pp. 97–98)—the corresponding provision of the general federal parole laws—shows that the two statutes were worded in substantially identical phraseology when *Fleming* v. *Tate* was decided. The only difference was that, whereas under § 24–206 of the District of Columbia Code the appearance was required to be before the "Board" itself, the appearance provided for by 18 U. S. C. [1946 ed.] 719 could be before the "Board of Parole, a member thereof, or an examiner designated by the Board." (N. B. In 1947, § 24–206 of the District of Columbia Code was amended so as to permit the parolee's appearance to be, as in the case of appearances

in stating that a paroled prisoner returned to custody "shall be given an opportunity to appear before said board of parole," meant he should have an effective hearing, including assistance of counsel, and the long practice otherwise was unlawful. The decision would seem to invalidate on habeas corpus a vast number of parole revocations. Congress, in revising the parole law, Revised Title 18, Sec. 4207, changed the wording to read: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board."[19] This change cuts deeply into the idea that the appearance is to be a trial. An examiner may conduct it now, and it would seem that the taking of the testimony of the prisoner, and perhaps his witnesses, is

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under 18 U. S. C. [1946 ed.] 719, before "the Board, a member thereof, or an examiner designated by the Board." Act of July 17, 1947, c. 263, § 5, 61 Stat. 378, 379. In addition to thus making the phraseology of § 24–206 of the District of Columbia Code conform to that of 18 U. S. C. [1946 ed.] 719, the 1947 amendatory Act (same section) added the following new provision to § 24–206, not contained in 18 U. S. C. [1946 ed.] 719: "At such hearing he may be represented by counsel." See note 34, pp. 76–77, *infra*.)

[19] The majority were mistaken in thinking that the clause "a member thereof, or an examiner designated by the Board" was introduced into the parole laws for the first time in the 1948 revision of Title 18 of the United States Code. See 18 U. S. C. [1946 ed.] 719 (Appendix, *infra*, pp. 97–98); *id.* [1940 ed.]; fn. 18, *supra*, pp. 30–31. The clause was added to the parole laws by the Act of June 29, 1940, c. 449, § 3, 54 Stat. 692.

alone contemplated. The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, following the appearance in person of the prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear. * * *"[20]

SUMMARY OF ARGUMENT

I

When, before the effective date of the district court judgment releasing petitioners on habeas corpus, the Parole Board acted to revoke petitioners' paroles, the alleged defect in the parole-violation warrants became unimportant, since they were merely preliminary processes for the retaking of the parolees, and the proper question for judicial consideration was whether the revocations of parole were void and the custody of peti-

[20] In view of the majority's decision that petitioners had not been deprived of any right to which they were entitled under the law in the conduct of the appearances granted them by the Board of Parole in the penitentiary, it would seem to follow that the order of reversal and remand—directing petitioners' restoration to respondent's custody "with leave to [petitioners], if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held" (*supra*, p. 28)—limits the scope of the permitted challenge of the revocation orders in the new proceedings in the District Court to an attack upon the revocations as being unsupported by any evidence or information of parole violation, and hence arbitrary.

tioners unlawful. See, e. g., *Stallings* v. *Splain*, 253 U. S. 339, 342–343; *Kelly* v. *Griffin*, 241 U. S. 6, 12–13; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662. The district court's order granting habeas corpus cannot be deemed to have had the effect of precluding Parole Board consideration of parole revocation or judicial review of the final revocations. *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843; *Morse* v. *United States*, 267 U. S. 80, 85; *Messenger* v. *Anderson*, 225 U. S. 436, 444. Consequently, as the court below stated, the district court erred when it "did not try at all the Warden's pleading presenting the orders of revocation, but hastily condemned them."

The remand order of the court below, granting leave to petitioners "to enlarge their pleadings so as to present, if they can, a case of total nullity" of the revocations, accords them every right that they can legitimately demand.

II

In allowing petitioners to appear before it and expressing its willingness separately to hear counsel orally or in writing and to receive relevant material or information, the Board of Parole accorded petitioners all the procedural rights to which they were entitled.

A. The "opportunity to appear" before the Board of Parole considering parole violations, granted in the Federal Parole Act, is not a right

to a full-dress formal hearing or trial. The word "hearing" is not even used in the statute; a parolee is, in contemplation of law, still a prisoner (*Anderson* v. *Corall*, 263 U. S. 193, 196); the Board's role is that of "guardian" of the parolee "ward"; and the practice in the States is to accord parolees either no hearing or a summary, informal one. In the light of these circumstances, there is no warrant for inferring that Congress made mandatory a formal hearing before parole could be validly revoked.

The contrary inference is, indeed, the more reasonable. From 1910 to the present, the parole boards have uniformly construed the statute as not requiring a formal hearing of the type petitioners demand, and implicit congressional sanction and approval appears to have been accorded this construction. During the legislative consideration of the Parole Act, moreover, a section of a bill containing the phrase "opportunity to appear" was described by the Senate and House conferees as containing provisions "substantially common" to another bill omitting the appearance requirement. Such a descriptive summary would hardly have been used if the phrase "opportunity to appear" connoted a formal hearing with all the accoutrements of a trial. Indeed, the statute could not, as a practical matter, be read to require a full trial, since Congress has not granted the Board the oath-administering, subpoena, and related powers which would be indispensable attri-

butes of a formal adjudicatory tribunal in this field.

In the closely related field of probation, this Court has held that one charged with violations of the terms of probation is not entitled to "a hearing upon such charges according to the established rules of judicial procedure." *Burns* v. *United States*, 287 U. S. 216, 219. The "end and aim" of the appearance required by the probation statute is "to enable an accused probationer to explain away the accusation * * *. This does not mean that he may insist upon a trial in any strict or formal sense." *Escoe* v. *Zerbst*, 295 U. S. 490, 493.

The Federal Parole Act does not impose a broad, inflexible requirement that a parolee is always entitled to produce witnesses and to have counsel representing him when he appears before the Board considering revocation. The Act requires only that an "opportunity to appear" be accorded, and there is no showing in this case that petitioners were denied that opportunity, particularly in view of the Board's willingness to hear counsel and receive relevant material and information, though not at the same time that it heard the parolees themselves. *Fleming* v. *Tate*, 156 F. 2d 848 (C. A. D. C.), construing provisions of the District of Columbia Code similar to those in the Federal Parole Act, does not require more. But if it be read as always requiring the hearing of counsel and witnesses at

the same time as the parolee makes his appearance, it is wrong. The mere absence of counsel does not, in all circumstances, constitute the denial of an "opportunity to appear". Compare, *e. g.*, *Quicksall* v. *Michigan*, 339 U. S. 660; *Betts* v. *Brady*, 316 U. S. 455, with *Gibbs* v. *Burke*, 337 U. S. 773, 780.

B. From what has already been said, it is apparent that Congress, in the Federal Parole Act, did not contemplate that parole revocation would constitute a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" Section 5 of the Administrative Procedure Act. Consequently, the parole revocation proceeding is not subject to Sections 5, 7, or 8 of the Administrative Procedure Act since those sections apply only in such cases.

Similarly, Section 6 (a) of the Administrative Procedure Act, properly read, does not add to the "opportunity to appear" required by the Parole Act. The first two sentences of the section imposing more stringent requirements, are less aptly descriptive of the parole revocation proceeding than is the third, referring to the right of an "interested person" to "appear" before "any agency" concerned with the "adjustment, or determination of any issue" in a "summary" "proceeding".

C. This Court has made it clear, in describing the status of a parolee and the rights of proba-

tioners in that analogous field, that the will of Congress is controlling and that the Constitution imposes no additional substantive or procedural requirements applicable to parole revocation. *Anderson* v. *Corall,* 263 U. S. 193, 196; *Burns* v. *United States,* 287 U. S. 216, 220; *Escoe* v. *Zerbst,* 295 U. S. 490, 492–493; cf. *Williams* v. *New York,* 337 U. S. 241, 247–251.

ARGUMENT

I

The District Court erred in releasing petitioners before a full hearing on the validity of the final parole revocations

Pretermitting for the moment questions relating to the fairness and legality of the mode of conduct of petitioners' appearances before the Board of Parole on September 8, 1948 (these questions being reserved for point II, *infra,* pp. 49–92), it is important to emphasize at the outset the extreme narrowness of the issue which this case presents for review, *viz.,* the correctness of the Court of Appeals' qualified judgment of reversal and remand, set forth at p. 28, *supra.*

When these habeas corpus proceedings were instituted, petitioners were being detained under parole-violation warrants charging them with having violated the terms of their paroles. They challenged the legality of these warrants on the ground that, allegedly, they had been arbitrarily issued; *i. e.,* it was claimed that the member of the Board of Parole who issued the warrants had,

contrary to the recitations contained in them, no information to support the charges of parole violation. The Government, as we have pointed out (*supra*, pp. 12–13, 22–23), both in its pleadings and oral argument in the District Court, took the position that habeas corpus to test the legality of petitioners' detention was premature until the administrative process, initiated by the issuance of the warrants, had been concluded by the issuance of orders revoking their paroles. See *United States ex rel. Jacobs* v. *Barc*, 141 F. 2d 480, 483 (C. A. 6). In effect, though not in terms, the Government demurred to the allegations of the petitions and subsequent pleadings, admitting their truth *arguendo* to test the question of law though not as a matter of fact. See *supra*, p. 15.[21]

The Government's contention was based (see R. 189) on the general principle that judicial redress from a supposed injury arising from administrative action may not be sought until prescribed administrative remedies have been exhausted[22]—

[21] Cf. *United States ex rel. De Lucia* v. *O'Donovan*, 178 F. 2d 876 (C. A. 7), pending on petition for a writ of certiorari, No. 163, this Term, a companion case to the instant case, where the Government formally demurred to habeas corpus allegations substantially identical with those made in the case at bar.

[22] *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 543–545; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–52; *United States* v. *Sing Tuck*, 194 U. S. 161, 167–168, 170; *Falbo* v. *United States*, 320 U. S. 549, 553–554; see *Estep* v. *United States*, 327 U. S. 114, 123. Even where the allegations of a habeas corpus petition, if true, show that the administrative

the same principle on which is based the well-settled rule in deportation cases that the adminis-

agency is without jurisdiction, the doctrine of the necessity of exhausting administrative remedies before resorting to the courts still applies. A contention to the contrary was rejected by this Court in *United States* v. *Sing Tuck*, *supra*. That was a habeas corpus proceeding by applicants for admission into the United States who claimed to be citizens but who had failed to invoke their statutory right to appeal to the Secretary of Commerce and Labor from the adverse decision of the immigrant inspector excluding them. Speaking for the Court, Mr. Justice Holmes said (194 U. S. at 167–168):

"* * * [T]he act * * * points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. If the appeal fails it then is time enough to consider whether upon a petition showing reasonable cause there ought to be a further trial upon *habeas corpus*.

"We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for *habeas corpus* setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. * * *"

Compare *Gates* v. *Woods*, 169 F. 2d 440, 443 (C. A. 4): "* * * The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject-matter."

trative process must be completed by the issuance of a deportation order before resort may be had to the courts to challenge the legality of any step in the administrative proceedings leading up to the issuance of the order.[23]

The District Court, in entering its orders of December 4, 1948 (*supra*, p. 23), sustaining the writs and directing petitioners' discharge from custody (the orders not to take effect, however, until 15 days thereafter, see *supra*, p. 24), re-

[23] The deportation process begins with the alien's arrest under a warrant charging him with being in the country in violation of law. This is followed by a hearing on the charges, the submission of proposed findings and a proposed order, and finally the issuance of the order, or warrant, of deportation. Habeas corpus proceedings challenging the legality of the alien's detention during these proceedings are premature until the administrative process has culminated in the final act—the issuance of the warrant of deportation. *United States ex rel. Zdunic* v. *Uhl*, 144 F. 2d 286 (C. A. 2), affirming 56 F. Supp. 403, 410 (S. D. N. Y.); *United States ex rel. Loucas* v. *Commissioner of Immigration*, 49 F. 2d 473 (S. D. N. Y.); *United States ex rel. Eisler* v. *District Director of Immigration*, 76 F. Supp. 737 (S. D. N. Y.), reversed on other grounds *sub nom. United States ex rel. Doyle* v. *District Director of Im. and Nat.*, 169 F. 2d 753 (C. A. 2); *United States ex rel. Petersen* v. *Commissioner of Immigration*, 1 F. Supp. 735, 736 (S. D. N. Y.); cf. *United States ex rel. Potash* v. *District Director of Im. and Nat.*, 169 F. 2d 747, 752 (C. A. 2); *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457, 459–460 (C. A. 3), vacated on other grounds, 168 F. 2d 1014; *Impiriale* v. *Perkins*, 66 F. 2d 805, 806 (C. A. D. C.), certiorari denied, 290 U. S. 690; *Scholnick* v. *Clark*, 81 F. Supp. 298 (D. D. C.). There would seem to be little reason for affording readier access to the courts to convicted felons charged with parole violation than is granted resident aliens charged with being unlawfully in the country.

jected this contention of the Government. It held that where a parolee, held under a parole-violation warrant, alleges that the warrant was issued without information of parole violation, and where he adduces evidence which makes out a *prima facie* case in support of his allegation (which evidence the Government, insisting on its contention that the habeas corpus proceedings are premature, does not rebut), he is entitled to be discharged from custody without awaiting final action by the Board of Parole. At this juncture, the legal issue involved was precisely the same as the issue involved in *United States ex rel. De Lucia* v. *O'Donovan,* 178 F. 2d 876 (C. A. 7), pending on petition for a writ of certiorari, No. 163, this Term (see pp. 13–14 of our petition in that case).[24] However, subsequent developments in the case at bar had the effect of mooting this issue, as the court below held, with the result that the actual decision of the Court of Appeals in this case is much narrower than the Seventh Circuit's decision in the *De Lucia* case.

In the present case, during the 15-day interval which elapsed between the date of entry of the District Court's judgment and the effective date of the judgment, the Board of Parole revoked petitioners' paroles. This action constituted the final administrative action which the Government

[24] The Seventh Circuit, in the *De Lucia* case, reached the same conclusion as that reached by the District Court in the case at bar.

had insisted, thus far unsuccessfully, was a condition precedent to petitioners' right to challenge the validity of their detention judicially. The Government, accordingly, immediately petitioned the District Court to reconsider its judgment directing petitioners' discharge in the light of the change in their status from parolees held under warrants charging parole violation to ex-parolees held under the original commitments themselves. The evident purpose of the filing of the motions for reconsideration was, of course, to reopen the habeas corpus proceedings, thus far premature in the Government's view, but now ripe for consideration, in order to afford the Government the opportunity to refute petitioners' claims that the Board of Parole had been acting arbitrarily. The District Court, however, summarily denied the Government's motions, stating that "If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met with anything but silence similar to that encountered at the hearings already had and nothing would be gained" (*supra*, pp. 26–27).[25]

It was this action of the District Court which the majority of the Court of Appeals held erroneous. As we have pointed out (*supra*,

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[25] An independent ground assigned by the court for its refusal to grant the motions for reconsideration was that the revocation orders had been issued "without fair hearings" (*supra*, p. 27). Questions relating to this aspect of the case are discussed in point II, *infra*, pp. 49–92.

pp. 27–28), the majority below did not find it necessary to decide whether the District Court was right or wrong in entering its orders of December 4, 1948, directing petitioners' discharge. In the opinion of the majority, the intervention of the parole-revocation orders between that date and the date as of which the discharge orders were to become effective effectually mooted the issue of the legality of petitioners' prior detention under the warrants. We submit that this view is correct. Prior to the revocation of their paroles, petitioners were parolees arrested and held under warrants charging them with parole violation. Upon the revocation of their paroles, the nature of their status was changed. They were then no longer parolees detained merely on charges of parole violation, but convicts imprisoned under the authority of the original convictions and commitments. Their new status was comparable, as pointed out by the majority (R. 274–275), to that of aliens held under deportation orders, or defendants convicted or held for trial under indictments, whose original arrests may have been in some manner irregular. It is well settled that a defect or irregularity in the mode of arrest is not open to attack in such cases. See *Albrecht* v. *United States,* 273 U. S. 1; *Bilokumsky* v. *Tod,* 263 U. S. 149, 158; *Stallings* v. *Splain,* 253 U. S. 339, 342–343; *Kelly* v. *Griffin,* 241 U. S. 6, 12–13; *In re Johnson, Petitioner,* 167 U. S. 120, 125–127;

Iasigi v. *Van De Carr*, 166 U. S. 391; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662; 22 C. J. S., *Criminal Law*, § 144; 14 Am. Jur., *Criminal Law*, § 219.

But, an argument never before made is now advanced by the petitioners, in their brief on the merits before this Court (pp. 3, 5, 13–16), to the effect that after the district judge held the parole violator warrants "void and jurisdictional" and rendered judgment granting habeas corpus, the Parole Board was without power to continue with the administrative proceeding which, within fifteen days of the entry of judgment, resulted in certificates of parole revocation. A corollary of this argument is also asserted—that the district judge's view of the warrant as "void and jurisdictional" had become the "law of the case". Consequently, the argument apparently goes, he, the Court of Appeals, and this Court were and are powerless to question that determination by even considering the validity of the final revocations.

Had the district court in this case specifically enjoined the Board of Parole from proceeding to consider and decide the question whether petitioners' paroles should be revoked, that injunction would have been plainly reversible as in violation of the doctrine of exhausion of administrative remedies under *Securities and Exchange Commission* v. *Otis & Co.*, 338 U. S. 843, reversing 176 F. 2d 34 (C. A. D. C.). Petitioners certainly cannot be in a better position simply because no specific injunc-

tion was issued. And their argument loses all force when it is noted, additionally, that the Parole Board whose proceedings petitioners would deem to have been enjoined, was and is not a party to this habeas corpus action. Any suggestion that the district judge's ruling in this case operates under the doctrine of *res judicata* to bar the warden's alleged privy (Br. 16), the Parole Board, from consideration of whether petitioners had in fact violated the terms of their parole, must give way to the well-established rule that "No discharge by writ of *habeas corpus* will operate as a bar to further proceedings in the same cause, unless the inquiry on the petition for writ involves a full investigation into the merits of the case—the guilt or innocence of the accused." *Morse* v. *United States*, 267 U. S. 80, 85, quoting *Benson* v. *Palmer*, 31 App. D. C. 561, 568, with approval. See also *United States* v. *Levy*, 268 U. S. 390. It is clear that the trial judge, in this habeas corpus proceeding, did not pass on the question whether petitioners had in fact violated their paroles.[26]

If, then, the doctrine of *res judicata* is inoperative to bar determination by the Board of Parole as to whether the paroles should be revoked, the more flexible rule of "law of the case" can hardly bar consideration by the courts of the validity of those

[26] As Judge Underwood said (R. 247), "It was not a question of violation of parole, but a question of possession of information by Judge Rogers. It is an attack on the validity of the warrants, not on the exclusive right of the Board to pass upon the question of parole."

revocations. "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power * * *. Of course, this court, at least, is free when the case comes here." *Messenger* v. *Anderson,* 225 U. S. 436, 444 (per Mr. Justice Holmes). Nothing in the trial court's findings and conclusions (R. 242–250) leading to the grant of habeas corpus nor in his order denying reconsideration (R. 253–254) suggests that he felt constrained by what he had already decided from considering the validity of the revocations finally entered. Such aversion as he exhibited to further consideration was no more and no less than that of any court confronted with a motion for reconsideration. In any event, his "law of the case", was neither the Court of Appeals' nor this Court's "law of the case." See *White* v. *Higgins,* 116 F. 2d 312, 317 (C. A. 1) (per Magruder, C. J.).

Upon the issuance by the Board of Parole of the orders revoking the paroles, thus mooting the question of the legality of petitioners' prior detention under the arrest warrants, the issue properly before the District Court, consequently, was the legality of petitioners' detention under the revocation orders, or, in other words, the validity of these orders, as the majority below, correctly in our opinion, held. And since the District Court, as the majority said, "did not try at all

the Warden's pleading presenting the orders of revocation, but hastily condemned them" (R. 276), it was proper for the court below to reverse the District Court's orders discharging petitioners, and to remand them to custody "with leave * * * to enlarge their pleadings so as to present, if they can, a case of total nullity" of the revocation orders (R. 276–277; *supra*, p. 28).[27]

[27] Petitioners contend that they are already reinstated parolees and that these causes are therefore moot (Br. 7, Pet. 130–137), but the contention is plainly insubstantial. They base their argument on the fact that in April 1949—after they had been released on habeas corpus, and while the Government's appeal from the orders of discharge was pending in the Court of Appeals—they were directed by the Board of Parole to consider themselves in parole status and to resume the submission of monthly reports, with which direction they have been since complying (see R. 262–264). But the argument assumes, as petitioners concede it must (Pet. 132), that the Parole Board has abandoned the revocation proceedings and acquiesced in the District Court's orders discharging them. Obviously, this is not the case. The Parole Board has revoked their paroles and, so far as it is concerned, petitioners are ex-parolees who would now be serving the balance of their prison terms but for the District Court's orders releasing them, which orders were successfully challenged on appeal. Clearly, the Board's decision in April 1949 to direct the resumption by petitioners of the filing of monthly reports, *as though* they were still (or again) in parole status, in no way evidenced an intention on the part of the Board to acquiesce in the discharge orders, appeal from which was then pending. It is to be noted that petitioners also advanced this "mootness" argument in a motion in the Court of Appeals to dismiss the Government's appeal (R. 262–266), and that that court found so little merit in the argument that it made no mention of it either in its main opinion (R. 269–277) or in its supplementary opinion (R. 285) denying petitioners' motion for rehearing (R. 281–283), in which the argument was renewed (R. 282).

Under this qualified judgment of reversal and remand, it is now open to petitioners to amend their pleadings so as to allege that the revocation orders are totally void because issued arbitrarily, without evidence or information of parole violation. It is difficult to see how petitioners can have any valid objection to this disposition of their case. If they amend their pleadings in the manner permitted by the Court of Appeals' judgment, and if the Government fails to contradict their allegations of arbitrary and capricious action, they will be immediately entitled to their liberty as reinstated parolees.[28] If, on the other hand, the Government contradicts the charges of arbitrariness, it will then be incumbent on it to satisfy the District Court that the Board of Parole does have information supporting the charges of parole violation and so did not act arbitrarily in revoking the paroles.[29] In either event, peti-

[28] Because, as the record has developed in these cases, the validity of the Parole Board's revocations appears to depend solely on whether or not there is any factual basis whatever for the finding that petitioners violated the terms of their paroles, the Government has not challenged the judgment of the court below permitting judicial inquiry on that issue. It does not follow that in other cases bearing more directly on the permissible area of the Parole Board's complete discretion, Parole Board orders can properly be subjected to judicial review. See also note 29, *infra*.

[29] Of course, it will not be open to the District Court to inquire into the "reliability" of such information of parole violation as the Board of Parole may have; its function will be limited to ascertaining that the Board does have some information, and so did not act arbitrarily. *Fox* v. *Sanford*,

tioners will have received all that they can legitimately demand.

II

The applicable statutory and constitutional hearing requirements were fully met by the "opportunity" given petitioners "to appear" before the parole authorities

Congress has provided (18 U. S. C. [1946 ed.] 719, Appendix, *infra*, pp. 97–98) that—

> When a prisoner has been retaken upon a warrant issued by the Board of Parole, *he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board.* The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. * * * [Italics supplied.]

In this case, petitioners were allowed to appear before two members of the Board of Parole on September 8, 1948, in Atlanta Penitentiary, where they were questioned relative to the charges of

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123 F. 2d 334, 335 (C. A. 5); *Rogoway* v. *Warden*, 122 F. 2d 967, 968–969 (C. A. 9), certiorari denied, 315 U. S. 808; *Christianson* v. *Zerbst*, 89 F. 2d 40, 42 (C. A. 10); *Bass* v. *Hiatt*, 50 F. Supp. 420, 422 (M. D. Pa.). Judge Underwood, indeed, as we have pointed out (*supra*, p. 24), has indicated in the proceedings in this case his awareness of this limitation on the judicial inquiry (R. 203, 206, 244). And, obviously, the wisdom of the Board's action in revoking the paroles is beyond the scope of any judicial investigation, since the statute (18 U. S. C. [1946 ed.] 719, Appendix, *infra*, pp. 97–98) commits the question of whether a parole should be revoked, or its terms modified, to the discretion of the Board.

parole violation made against them. The proceedings were transcribed for the future use of the Board in its deliberations concerning whether the paroles should be revoked or allowed to remain in effect. But the Board, pursuant to its administrative practice, declined to permit counsel to be present and to represent petitioners at these appearances, though it did express willingness to hear counsel orally or in writing at its headquarters in Washington and to receive "any material or information bearing on these cases." The Board likewise refused petitioners' and their counsel's requests that they be accorded the right to produce witnesses in defense against the charges of parole violation, to be confronted by and cross-examine witnesses claiming to know of any instances of parole violation by petitioners, and to be furnished, at their expense, with transcripts of the proceedings. See *supra,* pp. 6–22. Petitioners here renew their contentions, made throughout the proceedings below, that they were entitled as of right to be accorded these considerations, and that the Board's refusal to grant them these rights rendered the orders revoking their paroles illegal and void (Br. 10–11, 13). They base their contentions on the Federal Parole Act itself, *i. e.,* the italicized portion of the above-quoted 18 U. S. C. [1946 ed.] 719; on *Fleming* v. *Tate,* 156 F. 2d 848 (C. A. D. C.), which construed an analogous provison of the District of Columbia Parole Act; on certain provisions of the Administrative Procedure

Act of June 11, 1946 (Appendix, *infra*, pp. 99–107); and the requirements of due process (Pet. 47–49, 98–130).

A. The Federal Parole Act does not require a formal hearing, including the right to be represented by counsel, in parole-revocation proceedings

1. *The language of the Federal Parole Act and the nature of parole.*—It should be noted, first, that Congress did not use the word "hearing" in the parole-revocation provisions of the Federal Parole Act (18 U. S. C. [1946 ed.] 719, *supra*, p. 49); it said "opportunity to appear." While it is obvious, of course, that Congress contemplated something more than the mere "physical presence" of the parolee (*Fleming* v. *Tate*, 156 F. 2d 848, 850 (C. A. D. C.)), it by no means follows that anything in the nature of a full-dress hearing, or trial, was contemplated. See Belshaw, *Elements of Hearing in Revocation of Parole Proceedings*, 37 Journ. of Crim. Law and Criminology 308. " 'Appearance' in the law has several significations, and the word must always be understood in reference to the particular business or subject-matter to which it relates" (1 Pope, *Legal Definitions*, p. 92).

A person who is charged with violating the criminal laws of the Federal Government is entitled to a judicial trial with all its traditional trappings—the unanimous verdict of a jury of twelve, the assistance of counsel, presumption of innocence, proof beyond a reasonable doubt, etc.

But the nature of the hearing to be accorded, for example, to a prisoner charged with violating prison regulations—on the outcome of which will depend such matters as whether he will forfeit accumulated "good time," be deprived of prison privileges, etc.—may obviously be less formal and less surrounded by safeguards usually associated with a judicial trial, without, on the other hand, being "unfair."

It is submitted that Congress, in requiring that the parolee accused of parole-violation be given an "opportunity to appear" before the Board of Parole, a member thereof, or an examiner designated by the Board before parole could be revoked, had in mind a hearing more akin to the latter type than to a formal trial. It must not be forgotten that a parolee is, in contemplation of law, still a prisoner. *Anderson* v. *Corall,* 263 U. S. 193, 196. He has had his day in court, and his sentence of imprisonment is still unserved. Parole is a thing of grace and not of right. Indeed, to a very large extent, the relationship between the Board and the parolee is the same as that between a warden and a convict still confined. Parole is not the end of punishment; it is part of it. A parolee is simply a prisoner whose permitted area of movement has been enlarged beyond the prison walls. See National Commission on Law Observance and Enforcement, *Report on Parole* (1931), pp. 129–130. While the parolee is on parole, he is, as it were, a ward, or charge,

of the Parole Board, whose paramount interest lies in rehabilitating him. The Board stands *in loco parentis* in relation to him.

In authorizing a prisoner's release on parole, the Board determines that there is a "reasonable probability" that he will "live and remain at liberty without violating the laws" and that his release is "not incompatible with the welfare of society" (18 U. S. C. [1946 ed.] 716, Appendix, *infra*, p. 94). It is therefore to the interest of the Board as well as to the interest of the parolee that the latter make good on parole. For these reasons, the Board will not normally terminate his parole unless there is good reason for so doing. And, even in a case of clear violation, revocation of parole does not necessarily follow since, considering all the manifold factors (see *Williams* v. *New York*, 337 U. S. 241, 246–250), the Board may deem revocation the least appropriate measure. See *infra*, p. 56.

It is entirely reasonable to assume, therefore, in view of this special relationship between the Board and the parolee, that Congress no more intended the "guardian" to conduct a formal or legal hearing concerning the behavior of its "ward" than it would require a warden to accord such hearing before changing the status, *in prison*, of one of the inmates. Congress merely intended that the Board should investigate carefully and give the alleged offender an opportunity to explain why and to what extent he has mis-

behaved. These considerations, it is submitted, contradict the idea that Congress ever intended the parolee's "appearance" before the Board to be anything resembling a formal court proceeding.

Our interpretation, as outlined above, of what Congress had in mind when it directed that the parolee be given an "opportunity to appear" before the Board of Parole prior to revocation of his parole, is persuasively supported, we submit, by the following excerpt from 4 *Attorney General's Survey of Release Procedures* (1939), pp. 245–248, reviewing the practices of the states with reference to parole-violation hearings, and the reasons for conducting such hearings:

> *Hearings on the violation of parole.*— In general hearings at which the nature and circumstances of the violation are discussed, and at which the alleged violator is given an opportunity to present his side of the story, are discretionary with the paroling authorities. Parole authorities in many of the States, however, make it a practice to hold hearings on violations in order to avoid the possibility of unjustly revoking parole on the basis of what may have been bias or faulty judgment on the part of parole or peace officers.
>
> The States can be divided into two general categories in relation to the practice of holding hearings on violations: (1) States in which violators are heard: Arizona, California, Delaware, District of

Columbia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, New York City, North Dakota, Pennsylvania, Texas, Washington, and the Federal parole system, and (2) States in which parole violators are returned automatically to prison without hearing on the question of violation: Alabama, Colorado, Florida, Georgia, Iowa, Louisiana, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee, South Dakota, West Virginia, Wisconsin, and Wyoming.

* * * * *

In practically every instance, the hearing on a parole violation is merely a formality to permit the returned violator to give his version of the events which led up to the revocation of his parole. As far as the parole authorities are concerned, the facts justifying the revocation of the parole almost invariably are clearly established before the time of (or concurrent with) the return of the offender to the institution.

A question naturally arises as to the advisability of holding these hearings which consume the time of men already overburdened with work. The answer to this objection is threefold: In the first place, the possibility exists that the parole agent was overhasty in his action in returning the parolee as a violator. Parole agents are human, and it is possible that friction

between the agent and parolee may have influenced the agent's judgment. In fairness to the violator, this is a possibility which should be investigated by some higher authority. The hearing is of special importance in those States in which the sponsorship system of supervision exists, since there have been numerous instances in which sponsor-employers "sweated" the parolees in their custody unmercifully under threat of declaring them parole violators on trumped up charges.

Another reason for holding a hearing is that often the true psychology of the parolee precedent to the commission of the violation is revealed. The trend of the parolee's thought in trying to rationalize his behavior may afford clues to his mental and emotional make-up which will be useful in effecting his future adjustment in society.

Third, the hearing is an opportunity for the violator to discuss his behavior and to have it analyzed by men who, by virtue of the positions they occupy, necessarily have an interest in his future behavior. If, through his own statements, a parole violator can be made to see how irrationally he has acted, and how twisted his thinking has been; if, as often is the case, he can be led to see himself as ridiculous or foolish by his own statements, a long step toward his ultimate rehabilitation may have been taken.

* * * * *

> It sometimes is argued that a parolee is entitled to legal representation at hearings on parole violations, but as the legal status of a parolee is exactly the same as though he were still incarcerated, the prevailing opinion is that his return to prison is an administrative prerogative of the authorities and that he has no legal grounds upon which to base his protest against such a return. By the same reasoning, if his return is effected through the properly authorized channels, he has no vested right to a formal hearing on the matter of his violation.

It is highly significant, we submit, that many states do not accord alleged parole violators hearings at all, and that of those which do provide for hearings, none requires anything in the nature of a formal hearing, or trial of the charges.

2. *The administrative construction and practice.*—From 1910, when the Federal parole system was established, until 1930, there was a separate parole board for each Federal penitentiary; from 1930 to the present, there has been a single Board of Parole having parole powers with respect to all Federal prisoners throughout the country. See Appendix, *infra,* pp. 95–96, fn. 6. Throughout these forty years of administering the parole laws, the parole boards have consistently and uniformly construed the "opportunity to appear" provision of 18 U. S. C. [1946 ed.] 719 as not requiring a formal hearing on parole-violation charges of the

type petitioners demand. "Federal Boards of Parole have uniformly assumed, in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board as to whether the welfare of society would be promoted by the granting, revocation or modification of parole." (Letter of August 6, 1948, from the Chairman of the Board of Parole to Mr. Stewart, counsel for petitioners, *supra*, p. 8; R. 216, 222–223.) See also Regulations of the Board of Parole, 28 C. F. R., §§ 2.13 and 2.14. This long-standing, uniform administrative construction, by the agency established by Congress to administer the parole laws, is entitled to great weight in ascertaining the true meaning of the "opportunity to appear" clause. *Hirshberg* v. *Cooke*, 336 U. S. 210, 217; *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351–352; *Neuberger* v. *Commissioner*, 311 U. S. 83, 89; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39; 49–50; *Bowen* v. *Johnston*, 306 U. S. 19, 29–30; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84; *Brewster* v. *Gage*, 280 U. S. 327, 336; *United States* v. *Jackson*, 280 U. S. 183, 193.

Moreover, this administrative construction would appear to have received implicit congressional sanction and approval in the 1940 amend-

ment of Section 6 of the Act of June 25, 1910 (this section being the section of the original 1910 Act, establishing the federal parole system, on which 18 U. S. C. [1946 ed.] 719 is based). While changing Section 6 in another respect,[30] Congress chose not to modify the "opportunity to appear" language. Since it must have been aware of the hearing procedures then (as now) in use by the Parole Board and any alleged inadequacies would have presented themselves for congressional correction, the absence of corrective language can fairly be taken as approval. *United States* v. *Wyoming*, 331 U. S. 440, 452–453; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500, and cases cited.

3. *The legislative history of 18 U. S. C. [1946 ed.] 719.*—The legislative history of 18 U. S. C. [1946 ed.] 719 supports the view that Congress, in specifying that a parolee rearrested on parole-violation charges be given an "opportunity to appear" before the Board of Parole prior to revocation of the parole, never contemplated that he should be given a formal hearing with all the normal incidents of a trial on the charges, but merely that he should be granted an informal appearance, the nature and extent of which would be left to the Board's discretion.

[30] The court below has suggested (R. 275) that such change as was made in the section fortifies the conclusion that Congress intended no proceeding in the nature of a trial.

The section in question is based on Section 6 of the Act of June 25, 1910, c. 387, 36 Stat. 820, which read in pertinent part, and in substantially the same language as at present, as follows:

> At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. * * *

The bill which became the 1910 Act was S. 870, 61st Cong. Section 6 of this bill, in its original form, had provided in pertinent part, and in substantially the same language as that set forth above, as follows (see *Senate Bills,* vol. 299, part 2 ["Senate Bills, 61st Congress. Nos. 861–1360"]):

> At the next meeting of the board of parole, held at such prison, after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison he shall be given an opportunity to appear before said board of parole, and the said board may, after such opportunity has been given, or in case said prisoner has not been

> returned, declare said prisoner to be a delinquent and bond forfeited, and he shall, whenever arrested by virtue of said warrant, be thereafter imprisoned in said prison for the unexpired term of sentence of such prisoner at the time the delinquency is declared * * *.

The bill was reported from the Senate Judiciary Committee without amendment, and without a written report (45 Cong. Rec. 102), and subsequently passed the Senate without amendment (45 Cong. Rec. 1532).

The House Judiciary Committee, in reporting out the bill as thus passed by the Senate, amended it by striking it out in its entirety except for the enacting clause and substituting a new bill. See H. Rep. 1341, 61st Cong., 2d sess., p. 1. The section of the House Committee's proposed substitute bill which corresponded to Section 6 of the Senate bill, *supra,* was Section 4. It provided in pertinent part (*id.,* p. 2):

> At any time during the period of parole the board by which the prisoner was released may, in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. * * *

It is to be noted that the House Committee's substitute bill eliminated entirely the requirement that the parolee be given an "opportunity to appear" before the Parole Board prior to revocation of parole, and made the revocation of parole entirely discretionary with the Board. The Com-

mittee's explanation of its proposed substitute bill made it clear that, under the bill, "[t]he board may at any time revoke any order or parole or modify its conditions" (*id.*, p. 3).

The House Committee's substitute bill passed the House without amendment (45 Cong. Rec. 6377) following brief consideration on the House floor (*id.* 6373–6377), during which it was pointed out that, under the bill, parole would be "revocable at any time that this parole board may elect to revoke it" (*id.* 6374).

Thereafter, the Senate disagreed to the House amendment of its bill (substituting a new bill), the House insisted on its amendment, and conferees were appointed (45 Cong. Rec. 6773, 7103). The bill which emerged from the conference consisted of ten sections, of which seven were taken from the bill as passed by the Senate, and three from the House's substitute bill. See H. Rep. 1701, 61st Cong., 2d sess. [Conference Report], p. 5. Among the seven sections taken from the Senate bill, in slightly modified form, was Section 6, *supra*, pp. 60–61, which contained the "opportunity to appear" language (*id.*, pp. 2, 5). The "Statement of Managers on Part of the House" (*id.*, p. 5) stated:

> The report is of an amended bill, of which the first six sections and the last section are amended from the Senate act, and sections 7, 8, and 9 are substantially sections 5, 6, and 7 of the House substitute.

> The board of parole is made up substantially as recommended by the Senate. The time that the prisoner must serve before parole and the provisions for parole officers, gratuities, and as to prisoners in state reformatories are adopted from the House substitute. The Senate requirement of a bond and the House provision for advertisement of applications for parole are omitted. *The rest of the substitute is substantially common to both bills, the language only being varied.* [Italics supplied]

For present purposes, the significant language of the Conference Report is that in italics, *supra.* The conferees considered Section 6 of the original Senate bill (requiring that a parolee be given an "opportunity to appear," etc., before parole could be revoked) and Section 4 of the House substitute bill (making parole-revocation entirely discretionary with the Board, without the necessity of according the parolee an "opportunity to appear") to be "substantially" identical provisions. It is inconceivable that the conferees would have thus described these sections if the "opportunity to appear" provision of Section 6 of the Senate bill had ever been intended to connote a formal hearing with all the accoutrements of a trial.

The Conference Report, including the above-quoted "Statement of Managers on Part of the House," was thereafter read in the House (45 Cong. Rec. 8834–8835) and agreed to without further debate (*id.* 8911). It was likewise read in

the Senate and agreed to without further debate (*id.* 8873–8874). The conference bill thus was enacted into law.

For the foregoing reasons, it is submitted that the legislative history of Section 6 of the Act of June 25, 1910, on which 18 U. S. C. [1946 ed.] 719 is substantially based, provides affirmative evidence that Congress never contemplated that the "opportunity to appear" clause required a full-dress hearing of the type petitioners demand.

4. *Extrinsic evidence of the legislative intent: Congress' failure to equip the Board of Parole with the necessary machinery for conducting formal hearings.*—It is evident that any board or other administrative body concerned with convicts and their associates, in order to be able to conduct the type of formal hearing to which petitioners insist they are entitled, must have the power to issue subpoenas, authorize the payment of witnesses' transportation expenses, and require that the testimony of witnesses be given under oath or affirmation. The Board of Parole has none of these powers.[31] False testimony by

[31] Nothing in the Administrative Procedure Act is construable as conferring such powers on any administrative agency. Section 6 (c), *infra*, p. 102, provides that "Agency subpenas *authorized by law* shall be issued to any party upon request * * *" [italics supplied]. And Section 7 (b), *infra*, p. 103, provides that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and *within its powers*, to (1) administer oaths and affirmations, (2) issue subpenas *authorized by law*, * * *" [italics supplied]. But the italicized words make it clear

a witness before the Board would not be punishable as perjury.[32] Nor, by the same token, would a parolee charged with parole-violation who adduced false testimony by a witness on his behalf at his appearance before the Board be guilty of subornation of perjury. The sanction of the possibility of a perjury prosecution for the giving of false testimony is indispensable to a formal hearing or inquiry into the conduct of persons already convicted of crimes because of the substantial risk of false testimony by the parolee and the criminal elements with whom he may be involved.

The Board's lack of the subpoena power is an equally hampering obstacle to the conduct of a formal hearing. Where the alleged parole-viola-

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that the Act does not purport to confer subpoena and oath-administering powers on any agency. Section 6 (c), *supra*, means merely that *if an agency already has subpoena powers under existing law*, subpoenas shall be issued to any party on request. Similarly, Section 7 (b), *supra*, means merely that *if an agency already has subpoena and oath-administering powers under existing law*, subordinate hearing officers may exercise such powers. The legislative history of these subsections of the Act confirms this interpretation. See Sen. Doc. No. 248, 79th Cong., 2d sess. ("Administrative Procedure Act, Legislative History"), pp. 29–30, 363. See also *Attorney General's Manual on the Administrative Procedure Act*, pp. 67, 74–75, which further corroborates this construction of the subsections.

[32] Perjury is defined as wilful falsification of testimony under oath "before a competent tribunal, officer, or person, in any case in which *a law of the United States authorizes an oath to be administered*" [italics supplied] (18 U. S. C. [1946 ed.] 231; now 18 U. S. C. 1621).

tor produced witnesses in his behalf, it would inevitably be necessary for the Board to call witnesses who could establish the violation. Many such witnesses would be reluctant to appear voluntarily to testify against the parolee because of fear of bodily harm from the prisoner in reprisal for any testimony they might give against him. Since the Board lacks the power, possessed by a court, to compel the attendance of such witnesses, its ability to establish the parole-violation charged would in many cases be nullified or seriously impaired. The Board's lack of power to authorize the compensation of witnesses for transportation expenses incurred in their travel to the place of the hearing is another, equally evident obstacle to the conduct of the type of hearing to which petitioners claim they have a right.

If it had been the intent of Congress, in directing that a parolee rearrested as a parole violator should have an "opportunity to appear" before the Board before parole could be revoked, to guarantee to the parolee the sort of formal hearing now insisted upon by petitioners, provision would certainly have been made in the parole laws to equip the Board with the machinery essential to that end. The failure of Congress to provide the necessary machinery is strong evidence that Congress contemplated no such formal proceeding.

5. *Argument from analogy based on the nature of the hearing required in probation-revocation cases.*—Aid in ascertaining the legislative intent

embodied in the "opportunity to appear" requirement in parole-revocation proceedings may be sought from consideration of the type of hearing required in probation-revocation proceedings, as defined by this Court in *Burns* v. *United States*, 287 U. S. 216, and *Escoe* v. *Zerbst*, 295 U. S. 490. Probation, of course, serves much the same purpose as parole, the principal difference being that the probationer's sentence is suspended *ab initio*, by the sentencing court, whereas the parolee is released by the Parole Board after serving part of his sentence.

The federal probation system was established by the Act of March 4, 1925, c. 521, 43 Stat. 1259–1261 (18 U. S. C. [1946 ed.] 724–727). Section 1 authorized courts of the United States, following a defendant's conviction of, or plea of guilty to, any crime not punishable by death or life imprisonment, "to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best," the probation period not to exceed five years. Section 2 contained the provisions respecting revocation. It provided in pertinent part:

> At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. *Thereupon such probationer shall forthwith be taken before the court.* At any time after

> the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested *and brought before the court*. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. [Italics supplied.] [23]

In *Burns* v. *United States, supra,* and *Escoe* v. *Zerbst, supra,* this Court held that, by virtue of the italicized language in the above-quoted section, a probationer was entitled to a hearing before the court before his probation could be lawfully revoked, but that the hearing could be summary in character, nothing in the nature of a formal hearing or trial being required. In the *Burns* case, Burns was sentenced to one year's imprisonment on one count of an indictment and to five years' imprisonment on another count. Execution of the five-year sentence was suspended and he was placed on probation with respect thereto. While serving the one-year sentence, he was brought before the court, charged with violating the terms of his probation under the five-year sentence. The charge was that, on various days during his service of the one-year sentence, having been granted temporary release from confinement in order to visit a dentist for nec-

[23] The quoted section was amended in 1933 (see 18 U. S. C. [1946 ed.] 725), but in respects not here relevant.

essary dental work, he abused the privilege by going to his home instead. Following a summary hearing, at which the court satisfied itself that the charges were true, his probation under the five-year sentence was revoked. Burns' counsel sought to adduce further evidence, but the request was refused. Burns challenged the validity of the revocation order, complaining of the summary character of the hearing. This Court said, however (287 U. S. at 219–222):

> Petitioner objects to the summary character of the proceeding. He urges that he was entitled to previous notice of specific charges of violation of the terms of probation and to *a hearing upon such charges according to the established rules of judicial procedure.* * * *
>
> The Federal Probation Act * * * confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender * * *. Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that care-

ful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved," to suspend the imposition or execution of sentence and "to place the defendant upon probation for such period and upon such terms and conditions as they may deem best."

There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. * * * There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. * * *

* * * * *

The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial

> *upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion.* * * * [Italics supplied.]

The *Escoe* case, *supra*, 295 U. S. 490, reaffirmed the principles of the *Burns* case. There, the court which had placed Escoe on probation revoked the probation without any hearing whatever, upon its *ex parte* determination that he had violated the terms of probation, the court's finding having been based on a report by the probation officer. While this Court nullified the revocation order because of the failure to hold any hearing whatever, it pointed out, nevertheless, that only a summary hearing was required. It said (295 U. S. at 493):

> * * * Clearly the end and aim of an appearance before the court must be *to enable an accused probationer to explain away the accusation* [of violation of the terms of probation]. The charge against him may have been inspired by rumor or mistake or even downright malice. *He shall have a chance to say his say* before the word of his pursuers is received to his undoing. *This does not mean that he may insist upon a trial in any strict or formal sense.* [Citing *Burns* v. *United States*, *supra*.] *It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the*

conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. * * * [Italics supplied.]

We submit that the above-quoted description of the purpose and scope of the probation-revocation hearing is equally applicable to the parole-violation hearing. The alleged parole violator, like the alleged probation-violator, must be given the opportunity to "explain away the accusation" and to "say his say," but, on the other hand, "[t]his does not mean that he may insist upon a trial in any strict or formal sense."

6. *The right to counsel and witnesses and* Fleming v. Tate.—Petitioners cite *Fleming* v. *Tate,* 156 F. 2d 848 (C. A. D. C.) as authority for their contention that they were entitled, at their appearances before the Parole Board, to be represented by counsel and to adduce testimony on their behalf in defense against the charges of parole violation (Br. 10). That case involved construction of Section 24–206 of the District of Columbia Code (1940 ed.). This Code section, based upon Section 6 of the District of Columbia Indeterminate Sentence and Parole Act of July 15, 1932, c. 492, 47 Stat. 696, 698, contained the revocation-of-parole provisions applicable to the District of Columbia parole system established by that Act. It provided, in pertinent part, and in

language substantially identical with that of the corresponding section of the Federal Parole Act (18 U. S. C. [1946 ed.] 719), as follows:

> At the next meeting of the Board of Indeterminate Sentence and Parole held after the issuing of a warrant for the retaking of any paroled prisoner, said board shall be notified thereof, and if such prisoner shall have been returned to the institution, he shall be given an opportunity to appear before said Board of Indeterminate Sentence and Parole, and the said board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof * * *.

Tate, having been paroled after serving 16 years of a 40-year sentence for housebreaking and larceny, was arrested under a violator warrant charging that he had left the District without the written approval of the Board of Indeterminate Sentence and Parole, in violation of the conditions of his parole. Following an appearance before the Board, his parole was revoked. The opinion states that "When Tate was arrested, counsel who had theretofore represented him applied for leave to appear in his behalf at the hearing, and Tate's employer requested permission to testify. These requests were denied because the Board does not permit counsel or

witnesses to appear at these hearings" (156 F. 2d at 849). Tate thereupon petitioned for a writ of habeas corpus, challenging the legality of the order of revocation. The District Court granted the writ, held a hearing, and ordered Tate discharged without prejudice to subsequent proceedings for the revocation of the parole in conformity with the statute. The Court of Appeals, in affirming the decision, said (156 F. 2d at 849–850):

> The question is one of statutory construction. No constitutional right is involved, as parole is a matter of grace. The statute requires that after a paroled prisoner is arrested for violation of his parole, he "shall be given an opportunity to appear before said Board." The District Court held that this provision means an effective appearance, and thus necessarily means the presence of counsel if the prisoner so elects, and the receipt of testimony if he has testimony to present.
>
> The limits of this decision must be carefully and emphatically stated. Appellant urges that the presence of counsel would convert the hearing into a legal battle; that the reasoning of the court would apply to applications for parole; that the hearings would be prolonged; that it would follow that if the prisoner had no counsel an attorney would have to be assigned him; that the rules of evidence would be in-

voked; that the presence of a prosecutor would be necessary; and that "Without doubt there are other procedural problems, presently unforeseen, which would rear their heads to plague the parole system." Not one of these results is to be understood as following from our holding in this case. The same situation does not exist in applications for parole. The presence of counsel does not mean that he may take over control of the proceeding. The receipt of testimony offered by the prisoner need not be governed by the strict rules of evidence, any more than the application of those rules is necessary in many informal administrative hearings. The presence of counsel and the receipt of testimony offered by the prisoner need not prolong the hearing beyond the time necessary in any event for the Board to ascertain the facts upon which it is about to act. It is not necessary that counsel be assigned, as the requirement here is not jurisdictional. The statute requires an "opportunity" to appear, no more. *The participation by counsel in a proceeding such as this need be no greater than is necessary to insure, to the Board as well as to the parolee, that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose.* But we believe that these minima are essential to a valid

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appearance before the Board as required by the statute. [Italics supplied.] "

"Following the Court of Appeals' decision in the *Tate* case, Congress passed "An act to reorganize the system of parole of prisoners convicted in the District of Columbia" (Act of July 17, 1947, c. 263, 61 Stat. 378). Section 5 of this Act amended the section of the District of Columbia Code which had been construed in *Fleming* v. *Tate* (§ 24–206, *supra*, p. 73) so as to make it read as follows:

"When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. *At such hearing he may be represented by counsel.* The Board may then, or at any time in its discretion, terminate the parole or modify the terms and conditions thereof. * * *" [Italics supplied].

It will be seen that, apart from purely phraseological changes, the amendment accomplished two things. It authorized "a member [of the Board], or an examiner designated by the Board," as well as the Board itself, to conduct the parole-revocation hearing—a change which had already been effected with respect to the Federal Parole Board in 1940 (see p. 31, fn. 19, *supra*). And secondly, it guaranteed the right of counsel at the hearing.

The legislative history of the amendatory Act indicates that the addition of the sentence guaranteeing the right of counsel at the parole-revocation hearing was in consequence of, and acquiescence in, the *Tate* decision, in so far as that decision held that a parolee was entitled to counsel at revocation hearings before the District of Columbia Board of Parole. The bill which became the amendatory Act, in its original form (H. R. 494, 80th Cong., 1st sess.) had provided: "* * * At such hearing he may, *in the discretion of the Board and under such rules as it may promulgate*, be represented by counsel. * * *" [Italics supplied]. See H. Rep. 451, 80th Cong., 1st sess., p. 5. The cited report contains (pp. 5–7) a letter from the Board of Commissioners of the District of Columbia to the Chairman of the House Committee on the District of Columbia explaining the purpose of the above-quoted proposed amendment. The letter

It is clear from the foregoing excerpt that the *Tate* decision is not at all an authority for the view that the Board of Parole must accord a parolee a formal hearing on the charges of parole violation. On the contrary, it holds that a summary and informal hearing suffices. It does hold that the parolee is entitled to counsel and to present testimony on his behalf, but even in these

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stated (*id.*, p. 6): "* * * The principal changes made in existing law are, * * *. Second, in the case of *Fleming* v. *Tate*, * * * it was held that, as the existing law provided that such a prisoner 'shall be given an opportunity to appear before said Board,' it was the intention of Congress to give him the right to be represented by counsel. Such a ruling was contrary to the administrative construction placed upon the act and also upon the similar Federal Parole Act which had been in existence since 1910. Under the present bill, it is provided that the prisoner, in the discretion of the Board, and under such rules as it may promulgate, may be represented by counsel. * * *" The proposed bill was reported favorably by the House District Committee without relevant amendment. H. Rep. 451, *supra*. The Senate District Committee, however, recommended that the words "in the discretion of the Board and under such rules as it may promulgate" be stricken, so that the sentence in question would read simply: "At such hearing he may be represented by counsel" (S. Rep. 373, 80th Cong., 1st sess.). The bill was finally enacted as thus amended.

Significantly, Congress has not undertaken to amend the Federal Parole Act in like fashion. Its failure to amend the Federal Parole Act so as to guarantee the right of counsel at revocation hearings, in the light of its specific amendment of the District of Columbia Parole Act to that end, indicates, if anything, that it is not yet ready to extend the guaranty of counsel to revocation hearings before the Federal Parole Board, which conducts such hearings throughout the country.

respects the holding is strictly qualified. The participation by counsel "need be no greater than is necessary to insure * * * that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose." In the case at bar, the Chairman of the Board of Parole, as pointed out by the majority below (R. 275–276), formally notified petitioners' counsel, in his letter of August 6, 1948 (*supra*, pp. 7–9), that the Board would be glad to confer with counsel at its Washington offices, and to receive on petitioners' behalf, either in person or in writing, "any material or information bearing on these cases." "*Any* material or information" would certainly include affidavits or depositions by witnesses whose testimony petitioner might desire the Board to hear. We submit that, in view of this formal offer to counsel, the Board of Parole here accorded petitioner all the rights to which, under the *Tate* decision, he was entitled. As the majority below observed (R. 275–276), "The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, following the appearance in person of the prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear."

In the *Tate* case, there does not appear to have

been any offer to counsel comparable to that made in the case at bar. The general language of the *Tate* opinion relative to the right to counsel and to adduce testimony must be read in the light of the absence, in that case, of this significant factor. In short, we submit that this case is distinguishable from the *Tate* case on this basis.

But if the *Tate* decision be read as standing for the broad rule that a parolee is *always* entitled to have counsel present *at the very hearing at which he himself appears* and to present testimony on his behalf *at that time*, so that the Board's offer to counsel in the present case to appear before the Board in Washington and present any relevant material or information on petitioners' behalf would not satisfy the requirements of the statute as construed in the *Tate* decision, we submit that that decision is wrong. The basic question is whether petitioners were accorded an "opportunity to appear" within the meaning of the statute. It cannot be successfully contended, we submit, that there is a denial of an "opportunity to appear" simply because counsel or witnesses are excluded from the hearing. See our arguments, *supra*, pp. 49–72, based upon the language of the pertinent statute, its legislative history, its consistent administrative interpretation, and various other relevant considerations, adduced in support of our contention that the "opportunity to appear," which Congress required before parole could be revoked, meant

simply an "opportunity" for the parolee to "say his say" to the Parole Board in defense against, or in explanation of, the charges of violation, or in extenuation of his conduct.

Even if it be assumed that there may be circumstances warranting the conclusion that the denial of a right to be represented by counsel, to be spoken for by another, or the exclusion of witnesses constitutes a denial of an "opportunity to appear",[35] there is no showing whatever in this case that petitioners were disadvantaged by the Board's refusal to admit counsel or witnesses to the hearing at which petitioners appeared, partic-

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[35] The Wickersham Commission's Advisory Committee on Parole only once mentions the question of attorney participation in parole board proceedings. It has this to say (National Commission on Law Observance and Enforcement, *Report of the Advisory Committee on Parole* (1931), pp. 303–304:

"The following is a short statement of the main deficiencies of parole as practiced generally in the United States: • • •

"3. Pleas of politicians, friends, fathers, mothers, brothers, and even attorneys employed by one or more of the aforementioned. It is a regulation of some paroling authorities that no oral arguments or statements, bespeaking parole for the offender, can be made before them; it is a practice of other paroling authorities to permit such statements to be made with little if any restriction or limit. Every paroling authority ought to seek all the facts available, but the practice of permitting friends of the offender to stand before the paroling authorities in person and beg the release of the offender and the reception of recommendations from influential politicians more often lead to bad decisions than to good. If parole be regarded as a continuation of treatment, such pleas seldom have any contribution to make."

ularly in the light of the Board's offer to hear counsel and receive relevant "material or information" at another time.[28]

This Court has sustained state convictions of serious crimes in which the accused was not represented by counsel. *Quicksall* v. *Michigan*, 339 U. S. 660; *Foster* v. *Illinois*, 332 U. S. 134; *Carter* v. *Illinois*, 329 U. S. 173; *Canizio* v. *New York*, 327 U. S. 82; *Betts* v. *Brady*, 316 U. S. 455. No one would maintain that the defendants in those cases were denied "opportunities to appear." *A fortiori*, a parolee is not denied an "opportunity to appear" simply because he is not represented by counsel.

B. The Administrative Procedure Act does not impose additional formal hearing requirements

1. *Parole revocation is not a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."*—Section 7 of the Administrative Procedure Act (Appendix, *infra*, pp. 102–104) is invoked by petitioners in support of their contention that they were entitled, at their appearances before the Parole Board on the parole-violation charges, to produce witnesses on their behalf, to cross-examine witnesses against them, and to be furnished

[28] Where by reason of "ignorance, youth, or other incapacity" (*Gibbs* v. *Burke*, 337 U. S. 773, 780), the parolee is unable himself to present his point of view to the Board of Parole, denial of representation might be deemed denial of an "opportunity to appear."

with transcripts of the proceedings. So far as is immediately pertinent, Section 7 provides:

> In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> * * * * *
>
> (c) EVIDENCE.— * * * Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *
>
> (d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. * * *

The validity of petitioners' contention thus depends, in view of the introductory clause of Section 7, *supra,* which limits the application of the entire section, on whether the appearances given parolees by the Parole Board on parole-violation charges, pursuant to 18 U. S. C. [1946 ed.] 719, are "hearings which section 4 or 5 requires to be conducted pursuant to" Section 7.

Section 4, having to do with "rule making," has no present relevance.[37] Consequently, the issue resolves itself into whether Section 5 (Appendix, *infra,* p. 101) applies to parole-revocation

[37] See the definitions of "rule" and "rule making" in Section 2 (c) (Appendix, *infra,* pp. 99–100).

appearances. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 48–51. Section 5 provides in pertinent part:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *—
>
> * * * * *
>
> (b) PROCEDURE.—The agency shall afford all interested parties opportunity for * * * (2) * * * hearing, and decision upon notice and in conformity with sections 7 and 8.
>
> * * * * *

Thus, the applicability of Section 5 in its entirety—and consequently of Sections 7 and 8 as well—to any given administrative function or process depends upon whether that function or process is a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," within the meaning of the introductory clause of Section 5.

We assume that the Board of Parole is an "agency" within the meaning of the broad and comprehensive definition of that term in the Act.[39]

[39] Section 2 (a) (Appendix, *infra*, p. 99) defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." But the Board of Parole is not once mentioned in the voluminous legislative history of the Act (see *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–40) as being subject to the Act's provisions (unlike a host of other agencies which are referred to by name as being generally covered by the Act).

And we may also assume for the moment, *arguendo,* that the parole-revocation process is an instance of "adjudication" within the definition of that term in the Act.[29] Hence, the validity of petitioners' contention turns on whether Congress, in requiring that every parolee who is retaken under a parole-violation warrant "be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board" prior to revocation of parole (18 U. S. C. [1946 ed.] 719, *infra,* p. 97), contemplated "adjudication * * * on the record after opportunity for an agency hearing." We believe that Point A, *supra,* pp. 51–81, demonstrates that Congress intended no such adjudicatory process resulting in a decision based on a record; that the most that Congress intended was an informal, summary appearance at which the Board might meet the parolee face to face and hear what he has to say for himself in answer to the charges or in explanation or mitigation of his behavior. It is clear, we think, that Congress had no purpose to confine the Board to

[29] "Adjudication" is defined in the Act as "agency process for the formulation of an order (Section 2 (d), *infra,* p. 100), which, in turn, is defined as "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing" (*ibid.*). Though this is indeed a broad definition, other provisions of the Act suggest that it has its limitations. See *infra,* pp. 86–89.

a record made at the time of the parolee's appearance before it; the Board was to judge the parolee as an individual, and his entire life, not one small segment revolving about an alleged parole violation, was properly to be considered.

2. *Section 6 (a) of the Administrative Procedure Act does not require that a parolee be permitted to be represented by counsel at his appearance before the Parole Board considering revocation of parole.*—We have sought to demonstrate that representation by counsel before the Board of Parole is not always and necessarily an essential ingredient of the "opportunity to appear" afforded the parolee by the Federal Parole Act. See *supra,* pp. 51–81. And we have, in that connection, referred to the consistent administrative practice and construction supporting that view. See *supra,* pp. 57–59. Nevertheless, petitioners seek to find in Section 6 (a) of the Administrative Procedure Act (Pet. 124–125) a reversal of that policy and a congressional direction that counsel be permitted to represent the parolee before the Board in all cases. This contention is advanced even though there is no evidence whatever that it occurred to anyone in the long consideration of the Administrative Procedure Act that the Parole Board and its operations might in any way be affected by the Act. See note 38, *supra,* p. 83.

We believe that a careful analysis of Section 6 (a) will serve to demonstrate that that which

was not contemplated was not unwittingly accomplished. The first three sentences of Section 6 (a) must be read and analyzed together, for in the differences in the language used appears the real meaning intended by its draftsmen. These sentences read as follows:

> Any *person compelled to appear in person* before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. *Every party* shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any *agency proceeding.* So far as the orderly conduct of public business permits, *any interested person* may appear before any *agency* or its responsible officers or employees for the presentation, *adjustment,* or *determination of any issue,* request, or controversy in *any proceeding* (interlocutory, *summary,* or otherwise) or in connection with any agency function. [Italics supplied.]

The first sentence of Section 6 (a) has no present application, for the parolee is not "compelled to appear" before the Board, being given by 18 U. S. C. [1946 ed.] 719, merely an "opportunity to appear." Appendix, *infra,* p. 97. In the second and third sentences are found the language differences which are believed to be controlling here. The second sentence, dealing with the right

of a "party" [40] in an "agency proceeding" [41] suggests a proceeding a good deal more formal than that of the Parole Board considering revocation of parole. See *supra*, pp. 51–81. That this is so is confirmed when these terms, in combination, are contrasted with those used in the third sentence. The third sentence refers not to "party" but to "any interested person"; it refers not to an "agency proceeding" but to an appearance "before any agency * * * for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding"; and the "proceeding" thus referred to is described as "interlocutory, summary, or otherwise." The differences between the language used in the second and third sentences are clearly the end product of a careful process of delineation; they reflect no mere use of synonyms but, rather, a shading in meaning that is here crucial. Compare Section 6 (a) as finally enacted with Section 6 (a) of the Senate Judiciary Committee Print of June, 1945. Sen. Doc. No. 248, 79th

[40] The section 2 (b) definition of "party" (Appendix, *infra*, p. 99) is not particularly helpful here since it reiterates the word "party" in the attempt at definition.

[41] "Agency proceeding" is defined in Section 2 (g), Appendix, *infra*, p. 100, as meaning "any agency process as defined in subsections (c), (d), and (e) of this section." Of the three subsections referred to, only two have possible relevance: Subsection (d), defining "adjudication," and (e), defining "licensing."

Cong., 2d Sess. ("Administrative Procedure Act, Legislative History"), p. 26.

Thus, the language in Section 6 (a) which is most aptly descriptive of Parole Board proceedings is the "summary" "proceeding" referred to in the third sentence. While the "agency proceeding" referred to in the second sentence and as broadly defined in Section 2 (g), Appendix, *infra*, p. 100, might literally apply to a Parole Board proceeding, that definition must, of necessity, be limited by the third category of proceedings described in the third sentence of section 6 (a). The parolee concerned with a revocation proceeding is more accurately described, also, as an "interested person" whose rights are defined by the third sentence rather than a "party" granted rights by the second. For, as has already been pointed out, *supra*, pp. 52–57, the parolee does not appear before the Board as an adverse "party"; the relationship is more in the nature of that which exists between "guardian" and "ward", and the "proceeding" more in the nature of an interview than an adjudicatory process.

It is sensible to conclude, then, that only the third of the first three sentences of Section 6 (a) is applicable to the Parole Board. And that sentence, in granting a right to "appear" "so far as the orderly conduct of public business permits", certainly adds nothing to the absolute "oppor-

tunity to appear" granted by the Federal Parole Act.[42]

C. The Constitution imposes no conditions on parole revocation

If, as we have sought to show, petitioners can find no support in either the Federal Parole Act or the Administrative Procedure Act for their contention that they were entitled to a formal hearing with counsel before their paroles could be revoked, their argument that a formal hearing is required must fail entirely. For the decisions of this Court make it clear that such rights as parolees may invoke must be derived from the applicable statutes, since the Constitution imposes neither substantive nor procedural requirements in this field.

In *Anderson* v. *Corall,* 263 U. S. 193, 196, this Court, discussing the status of a parolee under the Federal Parole Act, pointed out that "While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term * * *. While this is an amelioration of punishment, it is in legal effect imprisonment." So far as the Constitution is concerned, parole is of the same order as probation and, with respect to latter, this Court has said, through Mr. Chief Justice

[42] Whether and under what circumstances the "opportunity to appear" imports a right to representation by counsel is discussed *supra*, pp. 72–81.

Hughes (*Burns* v. *United States*, 287 U. S. 216, 220):

> Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. * * * The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain.

In other words, this Court has squarely ruled that it cannot accept the "contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." *Escoe* v. *Zerbst*, 295 U. S. 490, 492–493. The "source" of the privilege, Mr. Justice Cardozo continued for the Court, "is in the statute rather than in the Fifth Amendment." 295 U. S. at 493.

Being "a part of the course of treatment designed by the State for people who break the laws of the State,"[43] parole is, both legally and practically, a part of the sentence imposed on the convicted defendant. That being so, this Court's recent discussion of the procedures on sentence, even in a capital case, becomes particularly apro-

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[43] National Commission on Law Observance and Enforcement, *Report of the Advisory Committee on Parole* (1931), p. 298.

pos (*Williams* v. *New York*, 337 U. S. 241, 247–251):

> * * * modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.
>
> [It is] a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. * * * The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. * * *
>
> Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. * * * We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. * * * The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. * * *
>
> The considerations we have set out ad-

monish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. * * * The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

A. The Federal Parole Statutes

At the time of the issuance of the parole-violation warrants here involved (July 21, 1948), the pertinent provisions of the federal parole statutes were as follows:[1]

> 18 U. S. C. [1946 ed.] 714.[2] *Parole of prisoners; conditions.*—Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (Act of the June 25, 1910, c. 387, § 1, 36 Stat. 819, as amended

[1] The federal parole laws are now contained in §§ 4201–4207 of the 1948 revision and codification of Title 18 of the United States Code. This revision and codification became effective on September 1, 1948 (Act of June 25, 1948, c. 645, §§ 1, 20, 62 Stat. 683–858, 862), prior to the commencement, on September 2, 1948, of the habeas corpus proceedings here involved. However, the 1948 revision and codification introduced no relevant changes in the substance of previously existing law.

[2] Now 18 U. S. C. 4202. See fn. 1, *supra*.

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by the Act of January 23, 1913, c. 9, 37 Stat. 650.)

* * * * *

18 U. S. C. [1946 ed.] 716.[3] *Same; granting of parole; application; findings; terms and conditions;* * * *—If it shall appear to the Board of Parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the Board of Parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said Board of Parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, * * *; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. * * * (Act of June 25, 1910, c. 387, § 3, 36 Stat. 819, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

* * * * *

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[3] Now 18 U. S. C. 4203 (a). See fn. 1, *supra*, p. 93.

18 U. S. C. [1946 ed.] 717.[4] *Same; violation of parole; warrant for retaking prisoner.*—If [the warden of the prison or penitentiary from which said prisoner was paroled or][5] the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said [warden][6] at any time

[4] Now 18 U. S. C. 4205 (see fn. 1, *supra*, p. 93), which, however, eliminated certain obsolete provisions of the section as it formerly read (see fns. 5 and 6, *infra*, pp. 95–96).

[5] The bracketed words have been obsolete since June 12, 1930. They have been erroneously retained in successive editions of the United States Code published since that date, to and including the 1946 edition. The origin of the error is explained in the following footnote.

[6] The bracketed word "warden" has been obsolete since June 12, 1930. It should read "board or any member thereof." This error has been repeated in all editions of the United States Code published since that date, to and including the 1946 edition.

This and the error referred to in the preceding footnote are explained as follows:

Section 2 of the Act of June 25, 1910, c. 387, 36 Stat. 819 (this Act being the basic legislation establishing the federal parole system), provided for a separate "board of parole" for each federal penitentiary, consisting of the warden and the physician of the penitentiary and the "superintendent of prisons of the Department of Justice"—the latter official being thus a common member of all boards of parole. Section 4 of the Act (36 Stat. 820) was cast in language virtually identical with the language of above-quoted 18 U. S. C. [1946 ed.] 717.

The Act of May 13, 1930, c. 255, 46 Stat. 272, introduced substantive changes in the parole laws. The three sections of this Act (a fourth section merely designated the effective date of the Act as thirty days after its approval, or June 12, 1930) were inserted in all subsequently published editions of the United States Code, to and including the 1946 edition, as 18 U. S. C. 723a, 723b, and 723c, respectively (see pp. 95–96, *infra*, where these sections are set out in the

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within the term or terms of the prisoner's sentence, may issue his warrant to any

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text). Section 1 of the 1930 Act (18 U. S. C. [1946 ed.] 723a, *infra*, p. 98) created, "in lieu of all existing boards of parole at Federal penal and correctional institutions," "a single Board of Parole to consist of three members to be appointed by the Attorney General * * *." This amendment of the basic law was subsequently reflected in the various Code sections relating to parole, including that now under consideration. Section 2 of the 1930 Act (18 U. S. C. [1946 ed.] 723b, *infra*, p. 98) provided generally for the transfer of all power and authority formerly vested in the several boards of parole to the newly-created Board of Parole. Section 3 of the 1930 Act (18 U. S. C. [1946 ed.] 723c, *infra*, pp. 98–99) provided specifically that the newly-created "board, or any member thereof, shall hereafter have the *exclusive authority* to issue warrants for the retaking of any United States prisoner who has violated his parole" [italics supplied].

Though it is clear that the latter provision introduced a substantive change in the law as contained in § 4 of the basic 1910 Act, the compilers of the successive editions of the Code thereafter published neglected to reword the Code section corresponding to said § 4 (Title 18, § 717, quoted in text, *supra*) so as to indicate the change. By omitting the first bracketed matter, and substituting "board or any member thereof" for "warden," the 1930 amendment is fully reflected in the Code section.

It is to be noted that Section 4205 of the 1948 revision and codification of Title 18 (see fn. 1, *supra*, p. 93) consolidates §§ 717 and 723c of that title of previous editions of the Code and eliminates the obsolete features of § 717 (see Reviser's Note). In addition, Section 4205 omits reference to "reliable information [of parole-violation]" as a condition of the power to issue a retaking warrant. It provides in pertinent part:

"A warrant for the retaking of any United States prisoner *who has violated his parole*, may be issued *only by the Board of Parole or a member thereof* and within the maximum term or terms for which he was sentenced. * * *" [italics supplied].

officer hereinafter authorized to execute the same for the retaking of such prisoner. (Act of June 25, 1910, c. 387, § 4, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 718.[7] *Same; officers authorized to execute warrant;* * * *—Any officer of any Federal, penal, or correctional institution or any Federal officer authorized to serve criminal process within the United States, to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such prisoner and returning him to the custody of the Attorney General. * * * (Act of June 25, 1910, c. 387, § 5, 36 Stat. 820, as amended by the Act of June 29, 1940, c. 449, § 2, 54 Stat. 692.)

18 U. S. C. [1946 ed.] 719.[8] *Same; action by board on issue of warrant; revocation of parole.*—When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. (Act of June 25, 1910, c. 387, § 6, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46

[7] Now 18 U. S. C. 4206. See fn. 1, *supra*, p. 93.

[8] Now 18 U. S. C. 4207. See fn. 1, *supra*, p. 93.

Stat. 272, and the Act of June 29, 1940, c. 449, § 3, 54 Stat. 692.)

* * * * *

18 U. S. C. [1946 ed.] 723a.[9] *Same; creation of single Board of Parole; membership; appointment; salary.*—In lieu of all boards of parole at Federal penal and correctional institutions existing on June 12, 1930,[10] there is created as of that date a single Board of Parole to consist of three members to be appointed by the Attorney General, at a salary of $7,500 each per annum. (Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 723b. *Same; power, authority, and duties of Board of Parole;* * * *—All power and authority on June 12, 1930, vested in, and all duties on that date imposed upon, the Attorney General and the several boards of parole existing on that date with respect to the parole of United States prisoners are as of that date transferred to the Board of Parole created by section 723a of this title: * * * (Act of May 13, 1930, c. 255, § 2, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 723c.[11] *Same; violation of parole; warrant for retaking prisoner;* * * *—The Board of Parole created by section 723a of this title, or any member thereof, shall hereafter have the exclusive authority to issue warrants for the

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[9] Now 18 U. S. C. 4201 (see fn. 1, *supra*, p. 93), which, however, increased the number of members of the Board from three to five.

[10] See fn. 6, *supra*, pp. 95–96.

[11] Now consolidated with 18 U. S. C. [1946 ed.] 717, *supra*, pp. 95–97, and codified as 18 U. S. C. 4205. See fns. 4 and 6, *supra*, pp. 95–96.

retaking of any United States prisoner who has violated his parole. * * * (Act of May 13, 1930, c. 255, § 3, 46 Stat. 272.)

B. The Administrative Procedure Act

The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237, *et seq.*, provides in pertinent part:

SECTION 1. This Act may be cited as the Administrative Procedure Act."

DEFINITIONS

SEC. 2 [5 U. S. C. 1001]. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. * * * Except as to the requirements of section 3, there shall be excluded from the operation of this Act [certain designated types of agencies and functions, none pertinent].

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; * * *

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to imple-

ment, interpret, or prescribe law or policy * * *. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; * * * (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. * * *

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

SEC. 3 [5 U. S. C. 1002]. * * *

RULE MAKING

SEC. 4 [5 U. S. C. 1003]. * * *

ADJUDICATION

SEC. 5 [5 U. S. C. 1004]. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [with six exceptions, none pertinent]—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * *

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—* * * This subsection shall not apply * * * in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.— * * *

ANCILLARY MATTERS

SEC. 6 [5 U. S. C. 1005]. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled

to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. * * *

(b) INVESTIGATIONS.—* * *

(c) SUBPENAS.—Agency subpenas authoried by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. * * *

(d) DENIALS.— * * *

HEARING

SEC. 7 [5 U. S. C. 1006]. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. * * *

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall

constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8 [5 U. S. C. 1007]. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within the time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision * * *.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings and conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

SEC. 9 [5 U. S. C. 1008]. * * *

JUDICIAL REVIEW

SEC. 10 [5 U. S. C. 1009]. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for * * * habeas corpus) in any court of competent jurisdiction. * * *

(c) REVIEWABLE ACTS.—* * * Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

(d) INTERIM RELIEF.— * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute * * *. In making the foregoing determinations the court shall review the whole record or such portions thereof

as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

SEC. 11 [5 U. S. C. 1010]. * * *

CONSTRUCTION AND EFFECT

SEC. 12. [5 U. S. C. 1011]. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 536

LOUIS COMPAGNA AND CHARLES GIOE, PETITIONERS

v.

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 391-402) and its opinion and order denying motions for reconsideration of its judgments (R. 408-409) are reported at 82 F. Supp. 295. The majority (R. 437-445) and dissenting (R. 445-446) opinions in the Court of Appeals and that court's *per curiam* opinion and order denying a petition for rehearing (R. 452) are reported at 178 F. 2d 42.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1949 (R. 447) and a petition for rehearing was denied on December 16, 1949 (R. 452). The petition for a writ of certiorari was filed on January 12, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a prisoner held under a judgment of conviction, following his arrest as a parole violator and the revocation of his parole, is required to show, as a condition of his discharge on habeas corpus, that the order revoking parole is null and void, or whether it is sufficient that the court find that the warrant under which he was arrested as a parole violator was issued by the Board of Parole without information of parole violation.

STATUTES INVOLVED

At the time of the issuance of the parole-violation warrants here involved (July 21, 1948), the pertinent provisions of the parole laws were as follows:

> 18 U. S. C. [1946 ed.] 714. *Parole of prisoners; conditions.*
>
> Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct

shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (Act of June 25, 1910, c. 387, § 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650.)

18 U. S. C. [1946 ed.] 716. *Same; granting of parole; application; findings; terms and conditions;* * * *.

If it shall appear to the Board of Parole * * * that there is a reasonable probability that such applicant [for parole] will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the Board of Parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said Board of Parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence * * *. (Act of June 25, 1910, c. 387, § 3, 36 Stat. 819, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 717. *Same; violation of parole; warrant for retaking prisoner.*

If [the warden of the prison or penitentiary from which said prisoner was paroled or][1] the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said [warden][2] at any time within the term or

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[1] The bracketed words have been obsolete since May 13, 1930. They have been erroneously retained in successive editions of the United States Code published since that date, to and including the 1946 edition. See footnote 2, *infra*, for an explanation of the origin of the error.

[2] The bracketed word "warden" has been obsolete since May 13, 1930. It should read "board or any member thereof." This error has been repeated in all editions of the United States Code published since that date, to and including the 1946 edition.

This and the error referred to in the preceding footnote are explained as follows:

Section 2 of the Act of June 25, 1910, c. 387, 36 Stat. 819 (this Act being the basic legislation establishing the federal parole system), provided for a separate "board of parole" for each federal penitentiary, consisting of the warden and the physician of the penitentiary and the "superintendent of prisons of the Department of Justice"—the latter official being thus a common member of all boards of parole. Section 4 of the Act (36 Stat. 820) was cast in language virtually identical with the language of above-quoted 18 U.S.C. [1946 ed.] 717.

The Act of May 13, 1930, c. 255, 46 Stat. 272, introduced substantive changes in the parole laws. The three sections of this Act (a fourth section merely designated the effective date of the Act) were inserted in all editions of the United States Code thereafter published, to and including the 1946 edition, as 18 U.S.C. 723a, 723b, and 723c, respectively. The first section of the 1930 Act (18 U.S.C. [1946 ed.] 723a) created, "in lieu of all existing boards of parole at Federal penal and correctional institutions," "a single Board of Parole to consist of three members to be appointed by the Attorney General." This amendment of the basic law was subsequently reflected in the various Code sections relating to parole, including that now under consideration. The third section of the 1930 Act (18 U.S.C. [1946 ed.] 723c) provided that the newly-created "board, or any member thereof, shall hereafter

terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same for the retaking of such prisoner. (Act of June 25, 1910, c. 387, § 4, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 719. *Same; action by board on issue of warrant; revocation of parole.*

When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be re-

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have the *exclusive authority* to issue warrants for the retaking of any United States prisoner who has violated his parole. * * *" [emphasis supplied]. (See p. 6, *infra*, where this section is set out in the text.) Though it is clear that this provision introduced a substantive change in the law as contained in § 4 of the basic 1910 Act, the compilers of the successive editions of the Code thereafter published evidently overlooked the desirability of rewording the Code section (Title 18, § 717, quoted in text, *supra*) corresponding to said § 4, so as to indicate the change. By omitting the first bracketed matter in 18 U.S.C. [1946 ed.] 717, and by substituting "board or any member thereof" for "warden," the 1930 amendment is fully reflected in the Code section.

Section 4205 of new title 18 (effective September 1, 1948) consolidates §§ 717 and 723c of that title of previous editions of the Code and eliminates the obsolete features of § 717 (see Reviser's Note). It provides in pertinent part:

"A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. * * *"

voked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; * * *. (Act of June 25, 1910, c. 387, § 6, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272, and the Act of June 29, 1940, c. 449, § 3, 54 Stat. 692.)

18 U. S. C. [1946 ed.] 723c. *Same; violation of parole; warrant for retaking prisoner;* * * *.

The Board of Parole created by section 723a of this title,[3] or any member thereof, shall hereafter have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. * * * (Act of May 13, 1930, c. 255, § 3, 46 Stat. 272.)

STATEMENT

Petitioners are two of a group of defendants who were convicted in 1943, in the District Court for the Southern District of New York, of violating the federal Anti-Racketeering Act of 1934 (18 U. S. C. [1940 ed.] 420a) by conspiring to extort upwards of $1,000,000 from the motion picture industry (R. 61-64, 87). Each petitioner was sentenced to ten years' imprisonment and to pay a fine of $10,000 (R. 73-74). Their convictions were affirmed by the Court of Appeals for the Second Circuit, *United States* v. *Compagna*, 146 F. 2d 524, and this Court denied petitions for writs of certiorari, 324 U. S. 867.

[3] Section 723a, based on § 1 of the Act of May 13, 1930, c. 255, 46 Stat. 272, created a single Board of Parole for all penitentiaries in lieu of the several boards of parole previously existing. See footnote 2, *supra*, pp. 4-5.

On August 13, 1947, having served in excess of one-third of their prison sentences (see 18 U. S. C. [1946 ed.] 714, *supra*, pp. 2-3), petitioners were released from Leavenworth Penitentiary on parole (R. 52, 59). The paroling of petitioners (and of several of their convicted codefendants) was followed by unfavorable newspaper publicity in Chicago, and a subcommittee of the House Committee on Expenditures in the Executive Departments was appointed to investigate the operations of the Board of Parole and of these parolees' cases in particular (see p. 1 of H. Rep. 2441, 80th Cong., 2d sess., entitled "Investigation as to the Manner in which the United States Board of Parole is Operating, &c."). Extensive hearings were held by this subcommittee in Chicago and Washington beginning in September 1947 and continuing to June 1948 (*id.*, title page, and p. 2). The printed transcript of the hearings held up to March 11, 1948, was received in evidence in the habeas corpus proceeding here involved (see R. 276, 421) and is on file as an original exhibit in this Court. The transcript of these hearings indicates that members of the Board of Parole testified before the subcommittee that the Board was unaware of any instances of parole violation by petitioners up to the dates of their testifying.[4]

[4] Board member Fred Rogers, testifying on March 3, 1948, stated (Hearings, p. 573): "These men [petitioners and two of their convicted codefendants who had also been granted paroles] have been out for 6 months, and there has not been a single report of an infraction of a rule of society against

On July 21, 1948, Board member Rogers issued warrants (R. 57-58 [Compagna]; Gioe's omitted) for the arrest of petitioners as parole violators (see 18 U. S. C. [1946 ed.] 717, 723c, *supra*, pp. 4-5, 6), each warrant reciting, *inter alia*, that "reliable information" had been presented to the signer of the warrant that the parolee had "violated the conditions of his parole" (R. 57). The specific respects in which each petitioner had allegedly violated the terms of his parole were set forth in a document entitled "Referral for Consideration of Alleged Violation," bearing the same date as the warrant and addressed to the Board of Parole (R. 52, 59).[5] Petitioners were arrested pursuant to the warrants and were committed to Atlanta Penitentiary on July 23, 1948 (R. 30, 50, 51).

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them. • • • [N]ot one report [of parole violation] has been received by the Board of Parole."

Board member Boleslau Monkiewicz, testifying on March 9, 1948, gave like testimony (*id.*, p. 713).

[5] Compagna's "referral" listed the following charges against him (R. 59):

"1. Failure to reveal source of monies used in Settlement of Internal Revenue tax, when questioned before a legally constituted body.

"2. Failure to conduct himself honorably.

"3. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth."

Gioe's "referral" charged him with (R. 52):

"1. Change of employment without permission.

"2. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

"3. Association with persons of bad reputation.

"4. Failure to conduct himself honorably.

"5. Failure to give a proper accounting of income and expenditures."

On September 2, 1948, the present proceedings were instituted by the filing of petitions for writs of habeas corpus (R. 1-29, 32-37) on petitioners' behalf in the District Court for the Northern District of Georgia. The legality of petitioners' detention was challenged on the following two main grounds:[6] (1) The warrants for petitioners' arrest as parole violators were issued, it was alleged, without "reliable information" of violation (R. 1-11, 32-36); and (2) their original convictions were void because the prosecution, allegedly, knowingly used perjured testimony against them, and because the trial court lacked jurisdiction for the alleged reason that the conspiracy charged was not formed in New York (R. 11-19, 36-37). In connection with the first of these grounds, each petition further stated (R. 26, 35) that—

> The Parole Board has set September 8, 1948 as a tentative date for a hearing in prison and on this September 2, 1948 for the first time has notified your petitioner of the nature of the charges to be made as a basis for revocation [of parole] as follows:

This was followed by a listing of the specific charges of parole violation, as contained in the "referral" applicable to each (see footnote 5, *supra,* p. 8), and by general denials of the truth of such charges (R. 26-27, 35-36).

[6] Gioe's petition (R. 32-37) was less detailed than Compagna's lengthier petition (R. 1-29), but it in effect incorporated the latter by reference insofar as it was "applicable to [his] case" (R. 36).

Among the prayers for relief made by each petitioner was the request (R. 24; see R. 36) that "the Parole Board be ordered to grant your petitioner a hearing in compliance with the requirements of the Administrative Procedure Act [of June 11, 1946 (5 U. S. C. 1001-1011)]."

On September 20, 1948, pursuant to an order to show cause why the prayed-for writs should not issue (R. 38), respondent filed a response (R. 39-49) justifying his detention of petitioners on the basis of the original conviction and sentence of each (R. 39-41), and the issuance of the parole-violation warrants and the "referrals" listing the specifications of such violations (R. 39). Attached to the response as exhibits were the records of each petitioner's original conviction, sentence, commitment, etc. (R. 50-51, 54-56, 60-98), the parole-violation warrants (R. 57-58), and the "referrals" (R. 52, 59). The response further stated that, following his arrest as a parole violator, each petitioner (R. 42)—

> * * * was given a hearing in the regular routine course of business by the United States Board of Parole, by a majority number of the Board, in the United States Penitentiary in Atlanta, Georgia on September 8, 1948, and the Board will consider whether or not petitioner has actually violated his parole, and in due course an order will be entered, either holding that he has violated his parole or that he has not, in which latter event he will of

> course be released. However, such a decision has not been reached at [this] time * * *.

Accordingly, the response stated (R. 43; see also R. 47),—

> Petitioner has not * * * exhausted his administrative remedy, and this habeas corpus proceeding is premature * * *.

The response further denied the applicability of the Administrative Procedure Act to any phase of the activities of the Board of Parole (R. 43-47, 48-49).[7]

On September 27, 1948, each petitioner (see R. 31) filed an amendment of his petition (R. 30-31) alleging that the hearing accorded him on September 8, 1948, by two members of the Board of Parole was not such a hearing as is contemplated by the Administrative Procedure Act. Specifically, the amendment alleged (R. 30),—

> * * * Your petitioner was cross-examined concerning the charges herein referred to [*i.e.*, in the original petition; see p. 9, *supra*] and your petitioner repeated denial to said charges. A court reporter took notes. Your petitioner

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[7] The response also denied the propriety of an inquiry by a habeas corpus court into alleged use of perjury at a criminal trial (R. 41-42). As respondent later pointed out in an amendment of the response (see p. 13, *infra*), a charge that perjury was knowingly used by the prosecution to obtain a conviction must, since September 1, 1948, when § 2255 of new title 28 of the United States Code became effective, be made in the first instance in the court of conviction by motion to vacate the sentence.

> maintained and stated to the members of the Board that no violation of parole had occurred. The matter was continued generally and referred to Washington. No evidence other than that of your petitioner was introduced. Although specifically requested of the members of the Board on September 8, 1948, your petitioner was denied the right of counsel and all other necessary incidents of a proper hearing.

In a traverse to the response (R. 102-104), filed at about the same time as the amendment of the petition, each petitioner alleged (R. 103):

> 79. * * * Respondent has failed to meet the real issue and appears to take the position that the judgment is valid and the warrant good, regardless of the facts. We find no denial in the Response to the effect that perjury was used as alleged, or that the New York Court had no jurisdiction because of lack of venue. Nor do we find any denial in the Response that the warrant was arbitrarily issued in the absence of evidence.
>
> * * * * *
>
> 82. The Response alleges that final Administrative action has not been taken. Petitioner states the fact to be that the so-called warrant is a commitment and as such is final.

On September 27, 1948, following a hearing on the above pleadings (R. 106-166), writs of habeas corpus were granted, returnable on October 25, 1948 (R. 105).

On the latter date a hearing on the writs was held (R. 167-338) at which both petitioners testified (R. 169-197, 205-235). At the commencement of the hearing (see R. 168), respondent filed an amendment of his response to the show-cause order (R. 99-100), stating (R. 99):

> (a) That he is without knowledge whether perjury was committed in the conviction of the petitioner herein, or whether the Court for the Southern District of New York lacked venue, but that these are matters which might be raised by appropriate motion before the said trial court pursuant to the last paragraph of Section 2255, Title 28, U. S. C., as amended, effective September 1, 1948.
>
> (b) That he is without personal knowledge whether the warrant issued by the United States Board of Parole, under which petition [sic] was taken into custody, was issued capriciously and without reliable information, as alleged by the petitioner, but that the recitation in the warrant that it was issued upon reliable information creates a presumption of regularity and legality.

Petitioners testified at the hearing that the hearings accorded them by the Board of Parole in the penitentiary consisted merely of their being questioned by the two Board members present relative to the charges contained in the referrals, and that they were refused permission to be represented by counsel at the hearings and to produce witnesses in

their behalf (R. 178-180, 189-190, 209-210). The Government moved to strike all such testimony (R. 201-202), but the motion was denied (R. 202-204). Petitioners were also permitted to testify, over the repeated objections of the Government (R. 176, 181, 186, 201-202, 212, 215, 225), that the charges of parole violation, as contained in the referrals, were not true (R. 175-186, 210-222). The objections to both these lines of testimony were based on the asserted ground that it was the exclusive function of the Board of Parole to determine whether violations of parole had occurred, and that, pending decision by the Board as to whether there had been violations and whether the paroles should be revoked, petitioners' assertions in a habeas corpus proceeding that they had not violated their paroles and had not received fair hearings were irrelevant because premature (see, especially, R. 201-202).

Also received in evidence at the hearing on the writs, on petitioners' behalf, was a deposition by Board member Monkiewicz in the form of answers (R. 355-363) to certain written interrogatories (R. 372-374). The only interrogatories here relevant were as follows (R. 372-373):

> 52. Is the testimony given by you correctly reported in the printed copy of the volume entitled, "Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives

> Eightieth Congress Second Session."? Would you make the same answers here if the same questions were here put to you?
>
> 53. In the warrant signed by Judge Rogers, Judge Rogers recites that reliable information has been presented to him of a violation. Will you please state what the information was as to each case? When it reached you? Its source, and your reasons, if any, for believing it to be reliable?

Mr. Monkiewicz's answer to the first part of question No. 52 was "Yes,"[8] but he "decline[d] to answer the second part" of that question, or any part of question No. 53, on the ground that those questions "relate to a matter now pending before the Board of Parole" (R. 355).[9]

At the argument (R. 273-338) concluding the above hearing, counsel for petitioners contended that it had been established at the hearing that the Board of Parole issued the warrants of parole violation in the absence of reliable information of violation and that consequently the warrants were invalid and petitioners' detention illegal (R. 281, 285-286, 295). Government counsel renewed and amplified the Government's argument that the habeas corpus proceeding was premature because

[8] For the asserted relevance of this reply, see p. 7, *supra*, and footnote 4.

[9] Identical interrogatories were propounded to Board Chairman George Killinger (R. 370), who succeeded former Chairman Daniel Lyons during the pendency of the subcommittee hearings (see H. Rep. 2411, 80th Cong., 2d sess., p. 2), and identical answers were made (R. 346).

petitioners had not yet exhausted their administrative remedies. Since, it was urged, the Board of Parole had under advisement, following the hearings held in the penitentiary, the matter of whether petitioners' paroles should be revoked, and since the Board might finally determine that there had been no violations and thus effect petitioners' release within the framework of the administrative process, it was premature for a court to inquire into the legality of the detention in a habeas corpus proceeding (R. 308, 310-312, 314, 319, 326-327). In reply to the court's query as to what "information" the Board had to support the charges of parole violation contained in the warrants and the accompanying referrals (R. 330), counsel for the Government insisted that inquiry into this matter was premature for the above-stated reasons and announced their intention of "stand-[ing] on the proposition of law" (R. 329, 330-334).

On December 4, 1948, the District Court (Underwood, D. J.) made "findings of fact and conclusions of law" (R. 391-402) and entered an order (R. 403) sustaining the writs and directing petitioners' discharge from custody. The court held that under 18 U. S. C. [1946 ed.] 717, *supra*, pp. 4-5, an "express condition precedent to the issuance of a Parole Violator Warrant is that the issuing authority 'have reliable information that the prisoner has violated his parole.' This is in the nature of a jurisdictional requirement and may be inquired

into by competent authority" (R. 393); and that, while "[t]here is a presumption of the legality of the warrant, * * * it is not a conclusive presumption and it has been overcome by the evidence in the case" (R. 396). Judge Underwood made it clear that he did not conceive it his function to inquire into the reliability of the information on which the Board of Parole acted in issuing the warrants, but merely to determine whether the Board acted on any "substantial information," reliable or otherwise (R. 393-394, 398).[10]

In order to afford respondent an opportunity to appeal, and to enable the Board of Parole to issue new warrants based on reliable information of parole violation subsequently acquired, petitioners' discharge was ordered delayed for 15 days from the entry of the order sustaining the writs (R. 403).

On December 17, 1948, within this 15-day period, the Government filed in the District Court "motion[s] to reconsider" its judgment (R. 404-405) on the ground that on December 16th the Board of Parole had "taken action by revoking the parole[s]," with the consequence that respondent "now holds the said [petitioners] in custody upon the basis of the official revocation of parole[s]."

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[10] Judge Underwood held that petitioners' contentions that their original convictions were void were "without merit" (R. 392-393), and found it "not necessary to consider the other grounds of the petitions for writ of habeas corpus" (R 402).

Copies of the "certificate[s] of revocation" were attached to the motions (R. 406 [Compagna]; Gioe's omitted). Pursuant to a show-cause order (R. 407), a hearing on the motions was set for December 20, 1948. On the latter date, "Counsel advised the Court that they did not desire to present further evidence or argument" (R. 408), and the motions were denied (R. 409). The court observed in a short opinion (R. 408-409) that—

> These motions request reconsideration of the judgments for the sole reason that the Parole Board has now revoked the paroles, such action having been taken on December 16, 1948.
>
> On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the members of the Board declined to even state what violations of the parole were charged [11] and indicated that no hearings would be granted petitioner other than the "appearances" they had had before the Board. These "appearances" fall far short of the fair hearing which the law contemplates.

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[11] Judge Underwood's statement that "the members of the Board declined to even state what violations of the parole were charged" is inaccurate and misleading, as pointed out by the Court of Appeals (R. 442). Petitioners were well aware of the nature of the alleged violations at least as early as September 2, 1948, when they filed their petitions for habeas corpus (see p. 9, *supra*). It is probable that what Judge Underwood meant was that the members of the Board declined to state on what information the charges were based.

> If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met with anything but silence similar to that encountered at the hearings already had and nothing would be gained.
>
> The revocations of parole were based on illegal Parole Violator Warrants and were issued without fair hearings and in my opinion are invalid.

On respondent's appeal to the Court of Appeals for the Fifth Circuit, the orders sustaining the writs were reversed (R. 437-445, 447), one judge dissenting (R. 445-446). The majority found it unnecessary to determine whether the District Court was right when, on December 4, 1948, prior to the taking of final action by the Board of Parole on December 16 revoking the paroles, it ordered petitioners' discharge pursuant to its holding that parolees in custody under violation warrants can successfully challenge on habeas corpus the validity of their detention on a showing that the warrants were issued without information of violations. For the majority, the decisive feature of the case was the Board's taking of that final action of parole-revocation prior to the effective date of the District Court's order of discharge. Upon revocation of the paroles, the parolees were no longer held merely under the warrants alleging parole-violation, but, by virtue of the revocations, under the original commitments themselves. Consequently, the majority thought, after the paroles were revoked, the

question of the legality of the parolees' prior detention under the warrants became, in effect, moot. Upon revocation of parole, as the majority put it, "[t]he warrant has become unimportant" (R. 443). This view of the majority is further reflected in the following passage at the close of their opinion (R. 444-445):

> * * * If a revocation of a parole can ever be attacked collaterally by habeas corpus against the Warden, it ought to be nullified only on plain evidence and a full hearing. The district court here held that the warrant was invalid and that all that followed was void, and did not try at all the Warden's pleading presenting the orders of revocation, but hastily condemned them on the further ground that the hearing was unfair, and released the prisoners from the Warden's custody.
>
> The judgments appealed from are reversed and the appellees are directed to be remanded to the custody of the Warden, with leave to the applicants, if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held.

ARGUMENT

1. We have pointed out that throughout the proceedings in the District Court the Government maintained that habeas corpus to test the legality of petitioners' detention was premature until the Board of Parole took final action by revoking their paroles. The Government's contention was based

on the familiar principle that judicial redress from a supposed injury arising from administrative action, whether by habeas corpus or otherwise, may not be sought until prescribed administrative remedies have been exhausted. See *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 543-545; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-52; *United States* v. *Sing Tuck*, 194 U. S. 161, 167-168, 170; cf. *Falbo* v. *United States*, 320 U. S. 549, 553-554; *Estep* v. *United States*, 327 U. S. 114, 123.[12] It is this principle on which is based the well-settled rule in deportation cases that the administrative process must be completed by the issuance of a deportation order before resort may be had to the courts to challenge the legality of any step in the administrative proceedings leading up to the issuance of the order.[13]

---

[12] The *Sing Tuck* case involved a habeas corpus proceeding brought by applicants for admission into the country who claimed to be citizens, but who had been ordered excluded as aliens ineligible to enter. Immediately upon being excluded, they commenced habeas corpus proceedings without availing themselves of their right of appeal to the Secretary of the Treasury under the applicable statute. This Court held, however (194 U.S. at 167-168):

"* * * the act * * * points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. If the appeal fails it then is time enough to consider whether upon a petition showing probable cause there ought to be a further trial upon *habeas corpus*."

[13] The deportation process begins with the alien's arrest under a warrant charging him with being in the country in

The District Court, in entering its order of December 4, 1948, directing petitioners' discharge from custody, to take effect 15 days thereafter (*supra*, pp. 16-17), rejected this contention. It held that where a parolee, held under a parole-violation warrant, alleges and proves to the court's satisfaction that the warrant was issued without information of violation, he is entitled to be discharged from custody without awaiting final action by the Board of Parole. This is also the view of the Court of Appeals for the Seventh Circuit, which recently held that a demurrer to an allegation in a habeas corpus proceeding that a parole-violation warrant was issued without information of violation was properly overruled. *United States ex rel. DeLucia*

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violation of law. This is followed by a hearing on the charges, the submission of proposed findings and a proposed order, and finally the issuance of the order, or warrant, of deportation. Habeas corpus proceedings challenging the legality of the alien's detention during these proceedings are premature until the administrative process has culminated in the final act—the issuance of the warrant of deportation. *United States ex rel. Zdunic* v. *Uhl*, 144 F. 2d 286 (C.A. 2), affirming 56 F. Supp. 403, 410 (S.D.N.Y.); *United States ex rel. Loucas* v. *Commissioner of Immigration*, 49 F. 2d 473 (S.D.N.Y.); *United States ex rel. Eisler* v. *District Director of Immigration*, 76 F. Supp. 737 (S.D.N.Y.), reversed on other grounds *sub nom. United States ex rel. Doyle* v. *District Director of Im. and Nat.*, 169 F. 2d 753 (C.A. 2); *United States ex rel. Petersen* v. *Commissioner of Immigration*, 1 F. Supp. 735, 736 (S.D.N.Y.); cf. *United States ex rel. Potash* v. *District Director of Im. and Nat.*, 169 F. 2d 747, 752 (C.A. 2); *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457, 459-460 (C.A. 3), vacated on other grounds, 168 F. 2d 1014; *Impiriale* v. *Perkins*, 66 F. 2d 805, 806 (C.A.D.C.), certiorari denied, 290 U.S. 690.

v. *O'Donovan*, 178 F. 2d 876.[14] There is, however, no real conflict between the *DeLucia* decision and the decision below. For, as we have pointed out (*supra*, pp. 19-20), the court below did not find it necessary to decide this question. The decision below turned on the circumstance that final administrative action—revocation of the paroles—intervened between the District Court's original order of discharge and the effective date of the order. Upon the occurrence of that event, absent in the *DeLucia* case, petitioners' status was altered. They were then no longer held under warrants charging parole violations, but, in consequence of the revocations, under the original commitments themselves. The court below analogized their new status to that of aliens held under deportation orders, or defendants convicted or held for trial under indictments, whose original arrests may have been in some manner irregular, it being well settled that an irregularity in the mode of arrest is not open to attack in such

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[14] The Seventh Circuit held that the general principle requiring exhaustion of administrative remedies before resort could be had to the courts is inapplicable where the administrative agency "has exceeded its statutory authority" (178 F. 2d at 880), and that, under 18 U.S.C. [1946 ed.] 717, *supra*, pp. 4-5, authorizing the Board of Parole to issue a parole-violation warrant on receipt of "reliable information" of violation, the Board has no authority to issue a warrant where it has no information of violation. The court assumed, for the purposes of the decision, in view of the Government's demurrer, that the Board had no information of parole violation.

cases. See *Albrecht* v. *United States,* 273 U. S. 1; *Bilokumsky* v. *Tod,* 263 U. S. 149, 158; *Stallings* v. *Splain,* 253 U. S. 339, 342-343; *Kelly* v. *Griffin,* 241 U. S. 6, 12-13; *In re Johnson, Petitioner,* 167 U. S. 120, 125-127; *Iasigi* v. *Van DeCarr,* 166 U. S. 391; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 662. Accordingly, the court thought, the District Court should have granted the Government's motions, based on the intervening revocations and the resulting changed status of petitioners, to reconsider the orders discharging petitioners. The order of reversal and remand did not direct petitioners' restoration to custody in absolute terms, but rather their remand to the Warden's custody "with leave to [petitioners], if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held" (*supra,* p. 20). We submit that petitioners can have no valid objection to this disposition of their case.

2. Section 24-206 of the District of Columbia Code (1940 ed.) provides, in terms substantially identical with 18 U. S. C. [1946 ed.] 719, *supra,* p. 5, that a parolee who has been retaken under a parole-violation warrant "shall be given an opportunity to appear before [the] Board of Indeterminate Sentence and Parole." In *Fleming* v. *Tate,* 156 F. 2d 848 (C. A. D. C.), this statute

was construed as guaranteeing "an effective appearance, and thus necessarily means the presence of counsel if the prisoner so elects, and the receipt of testimony if he has testimony to present" (*id.* at 849). It appears from the court's opinion that "[w]hen Tate was arrested [under the parole-violation warrant], counsel who had theretofore represented him applied for leave to appear in his behalf at the hearing, and Tate's employer requested permission to testify," but that these requests were denied (*ibid.*). Petitioners claim the decision below is in conflict with the *Tate* decision (Pet. 17), since the court below approved the Board of Parole's conduct of the hearings granted petitioners, at which counsel was not permitted to be present (see pp. 11-12, *supra*).

It is true that the court below indicated disagreement with the *Tate* decision (R. 443). However, the opinion below points out what we think is a sound ground of distinction between the two cases. For here, as the majority below pointed out, "The Chairman [of the Board of Parole] by letter offered to let counsel come before the full Board in Washington and present any material or information bearing on the cases, though he declined to have a full scale trial. * * * The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, followed by the appearance in person of the

prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear" (R. 443-444). In the *Tate* case, there does not appear to have been any such offer by the Board to Tate's counsel. There is language in the *Tate* opinion which strongly indicates that if there had been such an offer the court would have found that the mandate of the statute had been satisfied. For the court there pointed out that "The statute requires an 'opportunity' to appear, no more. *The participation by counsel in a proceeding such as this need be no greater than is necessary to insure, to the Board as well as to the parolee, that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose*" [italics supplied] (156 F. 2d at 849-850).

But even assuming, *arguendo*, that the *Tate* decision stands for the broad rule that a parolee is entitled to have counsel present *at the same hearing at which he himself appears* and to present testimony on his behalf *at that time*, so that the Board's offer to counsel in the present case to appear before the Board in Washington and present any relevant material or information on petitioners' behalf would not satisfy the requirements of the statute as construed in the *Tate* decision, we submit that the conflict between the latter decision and

the views expressed below in this regard is not ripe for resolution by this Court. As we have pointed out (*supra*, p. 24), the mandate below is not a final disposition of this case. Petitioners have been ordered remanded to the Warden's custody, "with leave * * * to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held." If, in the new proceedings in the District Court thus directed, petitioners are successful in establishing the "total nullity" of the parole-revocation orders and are able finally to secure an adjudication that parole-revocation orders are subject to judicial review on habeas corpus (cf. R. 444), their consequent discharge would have the effect of mooting the asserted conflict between the *Tate* decision and the views below criticizing that decision. If, on the other hand, petitioners are unsuccessful they will then have another opportunity to urge the asserted conflict as a ground for this Court's grant of certiorari. But the issuance of certiorari at this time, to review the interlocutory judgment below, would only result in piecemeal disposition of the litigation.[15]

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[15] Petitioners contend (Pet. 98-130) that hearings before the Board of Parole are required to be conducted in accordance with the provisions of the Administrative Procedure Act. However, we think it clear from the provisions of that Act as a whole (60 Stat. 237-244; 5 U.S.C. 1001-1011), and particularly from Section 7(a) of the Act (5 U.S.C. 1006(a)) —providing that "nothing in this Act shall be deemed to

CONCLUSION

There is no real conflict of decisions and no question requiring further review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1950.

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supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute"—that the court below was clearly correct in concluding that "[t]he requirements as to procedure in the Administrative Procedure Act have no application to the Parole Board" (R. 443).

Petitioners' final contention (see Pet. 140-145) that they were entitled to litigate in the habeas corpus proceeding below the question of the validity of the original judgments of conviction is, of course, plainly unsound. See 28 U.S.C. 2255, requiring such a contention to be made in the first instance in the court of conviction. This section took effect on September 1, 1948, prior to the commencement of the habeas corpus proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. [redacted] 5 [redacted]

LOUIS COMPAGNA and CHARLES GIOE,
Petitioners,

vs.

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Respondent.

REPLY

TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 536

LOUIS COMPAGNA and CHARLES GIOE,
Petitioners,

vs.

WILLIAM H. HIATT, Warden, United States Penitentiary, Atlanta, Georgia,
Respondent.

REPLY

Companion Case

Shortly after our petition was filed here, in the case at bar, the Solicitor General obtained an order extending the time for Respondent to file a brief in opposition, for the reason that the Government desired to petition for certiorari in *United States ex rel. DeLucia* v. *Donovan*, 178 F. 2nd 876 (Respondent's Brief p. 23). The Solicitor General represented to Mr. Justice Black that it would be desirable to have the two cases considered here together. We agree, and submit that if the Government intends to proceed further in the *DeLucia case*, decision should not be made in the case at bar, until the *DeLucia case* is ready. The

Solicitor General has until June 29th, to file his petition in the *DeLucia case.*[1]

It would be unfortunate for us if your Honors denied certiorari here and learned from the Government petition in the *DeLucia case* that a conflict of decisions exists. In the case at bar we claim that there is a conflict. The Solicitor General asserts that the cases might be distinguished.

Questions Presented

We do not believe that our eleven questions, p. 7 can be fairly boiled down to the one question submitted by the Solicitor General, p. 2.

Administrative Procedure Act

Since our petition was filed here, Your Honors have decided *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, holding that administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act. The question had been decided both ways in the various circuits. In the case at bar the Solicitor General, p. 27 note 15, urges that the Administrative Procedure Act does not apply. The reasons given are the same as those given in cases overruled by the *Wong Yang Sung case.* Your Honors will remember that, in dissenting, p. 54, Mr. Justice Reed was of the opinion that the exception covers immigrant inspectors. So we assume that the defense now urged, in the case at bar, by the Solicitor General, received careful study in the *Wong case.*

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[1] A second extension was granted by the Chief Justice.

Right to Counsel

The right to counsel is only one of many rights denied these petitioners. The Circuit Court and the Solicitor General say that it is enough that we were invited to Washington. The letter referred to, R. 350, was written on August 6, 1948, by Dr. Killinger to counsel. This letter to counsel was in answer to a letter, R. 348, addressed to the Board on July 26, 1948. At that time the Board refused to disclose the basis of the warrant. The invitation to appear before the Board in Washington and to submit material was of no value. Please see again our petition, p. 41, "Mistakes of Majority as to Facts of Case."

Conclusion

The Solicitor General asserts, p. 27, that our case is not ripe for resolution by this Court—that we should go back to Atlanta and then come up here. If we are correct, if Judge Underwood is right and Judge Waller had the proper view, we have already shown the revocation to be a nullity. In order to make this showing petitioners were required to stay in prison as parole violators. They should not be required to do so again in order to secure an interpretation of the law. The Circuit Court, although requested on petition for rehearing, refused to clarify its mandate. Please see again our petition, p. 137, "The Order of Remand."

We submit that decision here is not only important to these petitioners. Thousands of persons are to be affected. The Parole Board has made a clear cut case by refusing to follow the Administrative Procedure Act, although requested. The public, the prisoners and the Board should know where we all stand. As Your Honors said, in the *Wong case*, p. 41, 45, 47.

> "But it would be a disservice to our form of government and to the administrative process itself if the

courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear. * * *

"It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act to construe this remedial legislation to eliminate so far as its text permits the practices it condemns. *

"The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter."

We submit that certiorari should be granted and upon hearing the conclusion by your Honors should be the same as that in the *Wong case,* (substituting Parole Board proceedings for "deportation proceedings") from which we again quote, p. 52:

"We find no basis in the purposes, history or test of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity. Since the proceeding in the case before us did not comply with these requirements, we sustain the writ of habeas corpus and direct release of the prisoner."

Respectfully submitted,

A. Walton Nall,
Wm. Scott Stewart,
Counsel for Petitioners.

No. 5. COMPAGNA ET AL. *v.* HIATT, WARDEN. Certiorari, 339 U. S. 955, to the United States Court of Appeals for the Fifth Circuit. Argued October 9–10, 1950. Decided November 13, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Wm. Scott Stewart* argued the cause for petitioners. With him on the brief was *A. Walton Nall*. *Stanley M. Silverberg* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan*. Reported below: 178 F. 2d 42.